Legal Research Pathfinder (法律检索指南)

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I. A clear statement of the issue/topic/area of law being researched(一段清晰的有关你研究的法律焦点、问题、或部门的陈述)

1. 论文题目:

民事合同与行政合同之关系研究——以国有土地使用权出让合同为例

2. 选题背景概述:

《中国行政审判案例》(第 2 卷)中刊登了第 68 号案例"无偿收回闲置土地决定应以相对人不存在免责事由为前提——爱克福得有限公司诉广东省深圳市国土资源和房产管理局无偿收回国有土地使用权案"(以下简称爱克福得案)。「该案例为我提供了两个层次的思路:第一层次在于对本案例的微观思考,旨在厘清本案中的争议点,并以此为基础提炼出相关的法律问题。在解决这些问题的过程中,我必定要进入到第二层次,即对民事合同与行政合同之间关系进行中观思考;中观思考的成果不仅有助于解决微观思考中提出的问题,更有可能超越案例、引申出新的理论论点。我将分别列出两个层次的法律焦点,以期使行文的过程更为清晰。至于关键词,则可以贯穿于微观与中观两个层面,故不分开列明。

- 3. 法律焦点(第一层次)——基于对爱克福得案的微观思考
 - 3.1. 国有土地使用权出让合同作为一种典型的行政合同,其"行政合同成分"与"民事合同成分"各占多少?
 - 3.2. 土地行政主管部门以土地使用权受让方违反合同约定、超期未动工开发为由,单方解除合同、作出无偿收回闲置土地的决定这两个行为究竟应当受合同法规范约束、还是相关行政法规范的约束,抑或是两者兼具?
 - 3.3. 国有土地使用权出让合同中的免责事由究竟应该适用哪些行政法规范、是否允许自由约定?
 - 3.4. 民法中的诚实信用原则与行政法中的信赖利益保护原则的关系如何?
- 4. 法律焦点(第二层次)——基于对民事合同与行政合同关系的中观思考
 - 4.1. 民事合同的理论与行政合同的理论有何关系?
 - 4.2. 民事合同的立法与行政合同的立法有何关系?
 - 4.3. 民事合同的履行与行政合同的履行有何异同?
- 5. 关键词(第一层次)2——基于对爱克福得案的微观思考
 - 5.1. Who: 本案当事人是谁?

深圳市国土资源和房产管理局——国土资源和房产管理局——行政机关

 1 最高人民法院行政审判庭编:《中国行政审判案例》(第 2 卷),中国法制出版社 2011 年版,第 173-179 页

² 本案的核心为国有土地使用权出让合同。然而,此种合同显然彻头彻尾的"中国特色"产物,在其他国家(尤其是英美法国家)并不存在。因此,第一层次的思考将基本在中国的语境(context)下展开,即基本采用中文关键词: 当然,可能有关的英文关键词也会尽量列出。

爱克福得有限公司——房地产开发企业——行政相对人

5.2. Where: 本案发生在哪里?

深圳市——经济特区

5.3. What: 本案争议点有哪些?

国有土地使用权出让合同——行政合同(政府合同、行政契约)——(民事)合同 收回闲置土地的决定——收回土地使用权的决定——收回权益的决定

5.4. When:本案发生在什么时候?

1995年至2007年

5.5. Why: 本案牵涉到了哪些实体法规范? 哪些诉讼法规范? 哪些法律原则? 《深圳经济特区土地使用权出让条例》——《城市房地产管理法》

行政合同免责事由——(民事)合同免责事由

行政诉讼举证责任——民事诉讼举证责任

诚实信用原则——信赖利益保护原则

Δ 可能的英文关键词:

Administrative Agreement

Administrative Contract

Administrative Law

Administrative Licensing

Administrative Organ

Agency

Burden of Proof

Civil Procedure

Contract Law

Exemption

Good Faith

Government Contract

Government Procure Contract

Land Leasing Contract

Lease Agreement

Legitimate Expectation

Public Contract

II. An indication of the audience to whom the pathfinder is directed (is this a pathfinder for your professors, law students, the experienced attorney, the non-lawyer interested in the topic?)(点明你的法律检索指南的读者群,如你的导师、同学、有经验的律师、其他对你的指南有兴趣的人们)

- 1. 国土资源和房产管理局等参与订立行政合同的行政机关
- 2. 房地产开发企业等参与订立行政合同的行政相对人
- 3. 行政法学者、行政法专业研究生
- 4. 民法学者、民法专业研究生
- 5. 行政诉讼、民事诉讼代理律师
- 6. 各级法院的行政审判庭、民事审判庭法官

III.. A list of relevant primary and secondary sources with annotations or evaluations for most materials included to assist the user in determining which materials will be most helpful, and an explanation of the resources (publications, databases, indexes, abstracts, catalogs, persons) you used in finding the sources you listed. For example, did you search all of the Law Journal Library on Heinonline? Did you check the online library catalog of your university? (列出如下原始和二次法律资源并加以解释和评价以便使用者了解哪些资源最有用;同时说明那些你所用的资源)

1. Chinese Legal Sources (中国法律资源)

- 1.1. Primary Sources (原始或一次资源)
 - 1.1.1. Statutes (法律)

无相应的法律规范。

评价与解释:

行政合同目前尚无相应的法律对其进行具体规定,但是相关的下位法规 定却数量庞大,因此法律规定的缺失并没有对该方面的法律文献检索造成阻 碍。这或许也是我在研究行政合同时值得思考的一点。

- 1.1.2. Regulations (行政法规、部门规章)
- 1.1.2.1. 【行政法规】国务院关于印发全面推进依法行政实施纲要的通知(法宝引证码: CLI .2.52352)

改革行政管理方式。要认真贯彻实施行政许可法,减少行政许可项目,规范行政许可行为,改革行政许可方式。要充分运用间接管理、动态管理和事后监督管理等手段对 经济和社会事务实施管理,充分发挥行政规划、行政指导、行政合同等方式的作用。

1.1.2.2. 【部门规章】国土资源部关于进一步规范探矿权管理有关问题的通知(法宝引证码: CLI .4.126379)

登记管理机关可依法以行政合同方式与探矿权人就勘查工作法规规定及相关事宜作出约定,进一步明确双方的责任、权利与义务,对勘查实施方案的实施实行合同管理。

1.1.2.3. 【部门规章】国土资源部关于贯彻实施《中华人民共和国物权法》的通知(法宝引证码: CLI.4.91435)

在国土资源管理工作中牢固树立物权观念,就是要求各级国土资源管理部门在行使国土资源管理职权的过程中,要以尊重行政管理相对人的物权为前提,不能随意干预当事人之间的财产关系和民事关系,不能随意取消当事人通过合法手段取得的行政许可,更不能打着维护公共利益的幌子损害集体和公民个人的财产权利。……要彻底改变过去主要依靠行政审批和行政执法手段行使管理权的做法,更多地将行政指导、行政奖励、行政合同等现代管理手段和人性化的执法方式运用到国土资源管理工作中,全面推进依法行政。

1.1.2.4. 【部门规章】国家人口计生委办公厅关于印发人口和计划生育系统依法行政"十一五"规划的通知(法宝引证码: CLI.4.89684)

在行政管理方式方面,要善于运用行政指导、行政许可、行政奖励、行政处罚以及 行政合同等多种手段实施计划生育管理。在直接管理和间接管理之间,重在间接管理; 在事前管理和事后管理之间,重在事前管理;坚持寓管理于服务中,杜绝或最大程度地 减少因管理方式不当而引发的计划生育工作矛盾和影响社会稳定的因素。继续深化行政 审批制度改革,严格按照《行政许可法》和国务院关于取消、改变和调整行政审批项目 有关决定的要求,规范人口和计划生育行政许可行为,减少行政许可(审批)项目,改 革行政许可(审批)方式,方便群众,节约管理成本。

1.1.2.5. 【部门规章】国家测绘局关于贯彻落实《全国测绘系统推进依法行政五年规划 (2006年-2010年)》的实施意见(法宝引证码: CLI.4.76665)

对于依法设定的测绘行政许可,要进一步完善许可条件、许可程序等内容。建立测 绘许可定期评价机制。改革对测绘行政许可事项的管理方式,充分利用间接管理手段、 动态管理机制和事后监督检查,加强对测绘行政许可事项的监管,发挥行政规划、行政 指导、行政合同等方式的作用。

1.1.2.6. 【部门规章】劳动和社会保障部关于印发劳动和社会保障部门贯彻国务院全面推

进依法行政实施纲要五年规划的通知(法宝引证码: CLI.4.75725)

改进社会管理方式。充分运用间接管理、动态管理和事后监督管理等手段对经济和 社会事务实施管理,充分发挥行政规划、行政指导、行政合同等方式的作用。完善工资 指导线、劳动力市场工资指导价位等行政指导制度,探索开展劳动用工、劳动合同签订 行政指导,在定点医疗机构、定点零售药店、工伤医疗机构、辅助器具配置机构、康复 机构等管理上,建立和完善行政合同管理方式。

1.1.2.7. 【部门规章】财政部关于印发《财政部门全面推进依法行政依法理财实施意见》 的通知(法宝引证码: CLI.4.58395)

积极探索新的财政管理方式,运用间接管理、动态管理和事后监督管理等方式,充分发挥财政政策、财政规划、财政指导、财政行政合同等方式的作用,对社会和经济事务进行调控。

1.1.2.8. 【部门规章】国防科学技术工业委员会关于印发《关于贯彻落实全面推进依法行政实施纲要的实施意见》的通知(法宝引证码: CLI.4.66017)

改革行政管理方式。要认真贯彻实施行政许可法,减少行政许可项目,规范行政许可行为,改革行政许可方式,加强行政许可监管。积极探索和运用行政规划、行政指导、行政合同等方式,实现行政管理目标,规范公共财政管理,完善依法行政的财政保障机制,加强对经费使用和规章执行情况的监督检查。

1.1.2.9. 【部门规章】中国人民银行关于贯彻《全面推进依法行政实施纲要》的意见(法宝引证码: CLI .4.129840)

更新行政管理观念,创新行政管理方式。依法履行市场监管职能,改进管理机制和管理方式,防止管理越位、缺位和错位,充分发挥市场主体、市场竞争机制、行业组织或中介组织的作用,保证管理的公正性和有效性,促进形成全国统一、规范有序、公平竞争的金融市场体系。更新管理理念,逐步推行兼顾事前管理和事后管理、静态管理和动态管理、直接管理和间接管理的新的管理方式,重视发挥行政规划、行政指导和行政合同在管理中的作用,积极创造条件吸引行政管理相对人参与管理,探索协商、选择、间接的管理机制,降低管理成本,提高工作效率。

1.1.2.10. 【部门规章】国家食品药品监督管理局关于贯彻落实《国务院对确需保留的行政审批项目设定行政许可的决定》的通知(法宝引证码: CLI .4.53578)

严格贯彻实施《行政许可法》,提高依法行政能力。实施行政许可必须严格依法进行,加强制约和监督,确保有关行政许可真正发挥作用。继续深化行政审批制度改革,对不需要行政许可但需要监管的事项,要强化间接管理和事后监督,充分发挥行政规划、行政指导、行政合同的作用。各部门、各单位要进一步强化服务观念,改进工作作风,做到公开透明、高效便民,提高依法行政能力,树立食品药品监管部门公正、权威的执法形象。

- 1.1.2.11. 【地方政府规章】辽宁省依法行政考核办法(法宝引证码: CLI .11.361966) 改革行政管理方式,规范行政许可行为,减少行政许可(审批)项目,发挥行政规 划、行政指导、行政合同等方式的作用,加快电子政务建设,推行行政权力网上透明运 行,扩大政府网上办公范围,建立电子监察网络,对行政机关实施行政许可(审批)的 情况进行监察。
- 1.1.2.12. 【地方政府规章】湖南省政府服务规定(法宝引证码: CLI.11.500262) 第十六条 各级人民政府及县级以上人民政府部门应当运用行政指导、行政规划、 行政合同、行政奖励、行政调解等方式,改善行政管理效果,提高服务质量和水平。

评价与解释:

涉及行政合同的规章数目非常多,上列的内容具有以下三个特点:一,行政合同的相关规定通常与行政许可的相关规定一起出现;二,行政合同通常被视为柔性执法方式的代表,与管理创新相联系;三,行政合同的适用多为提倡性,十分笼统,这或许与缺乏上位法规定有关。

1.1.2.13. 【地方政府规章】南京市公路及公路附属设施管理办法(法宝引证码: CLI .11.93503)

第二十条 公路管理机构可以在许可的范围内与申请人签订行政合同,具体明确双方权利义务。

1.1.2.14. 【地方政府规章】陕西省种畜禽管理办法(法宝引证码: CLI.11.11336)

第十五条 有条件的种畜禽场应当接受畜牧行政主管部门的委托,承担品种资源保护、新品种开发、培育、技术推广任务,双方应签订行政合同,约定权利、义务。

1.1.2.15. 【地方规范性文件】天津市市容和园林管理委员会关于印发《天津市市容和园林管理委员会法律审核暂行办法》的通知(法宝引证码: CLI.12.576268)

第二条 本办法所称合同,是指委机关、委属各单位及其所属独立法人单位对外签订的各类行政合同、民商事合同、技术服务合同、资产转让合同、租赁合同、工程合同、设计合同、投融资合同、借款合同、合资合作合同等涉及重大利益的合同。

.1.2.16. 【地方性法规】淄博市公共汽车客运管理条例(法宝引证码: CLI.10.40871) 第十二条 新开辟线路和需要重新确定经营者的线路,市交通行政主管部门应当按照公开、公平、公正的原则,通过服务质量招标等方式选定经营者,授予经营者线路经营权,颁发线路经营权证书,并与经营者签订交通管理行政合同。

第十四条 经营者取得线路经营权证书后未按照交通管理行政合同规定投入正常营运的,交通行政主管部门可以收回线路经营权证书。

第十六条 市交通行政主管部门应当根据本条例和交通管理行政合同定期对经营者进行考核评估。经考核评估,经营者两年不合格的,交通行政主管部门可以收回线路经营权证书。

评价与解释:

上列内容均系地方性规范,与前一部分相比,该部分内容并非为单纯的倡导性规定,而具有相当的操作性。这些规定应当就是上位法中倡导性规定的细化和落实。下位规范所具有的这些特点或许也是我在探讨行政合同与民事合同关系过程中需要注意的一方面,尤其是在法律文献检索时,应当对下位法规范作出更细致的梳理。

1.1.2.17. 【地方政府规章】山东省行政程序规定(法宝引证码: CLI .11.516207)

第六章 特别行为程序

第一节 行政合同

第一百条 本规定所称行政合同,是指行政机关为了维护公共利益,实现行政管理目的,与公民、法人和其他组织之间,经双方意思表示一致达成的协议。

行政合同主要适用于下列事项: (一)政府特许经营; (二)国有自然资源使用权出让; (三)国有资产承包经营、出售或者租赁; (四)公用征收、征用补偿; (五)政府购买公共服务; (六)政策信贷; (七)行政机关委托的科研、咨询; (八)计划生育管理; (九)法律、法规、规章规定可以订立行政合同的其他事项。

第一百零一条 订立行政合同应当遵循维护公益、公开竞争和自愿原则。

行政合同应当采取公开招标、拍卖等方式订立。有下列情形之一的,可以采取直接 磋商的方式订立: (一) 法律、法规有明确规定的; (二) 情况紧急需要尽快订立合同 的; (三) 行政机关委托的科研合同; (四) 需要保密的合同; (五) 需要利用专利权 或者其他专有权利的合同; (六) 需要采取直接磋商方式的其他情形。

法律、法规、规章对订立行政合同的方式另有规定的, 从其规定。

第一百零二条 行政合同应当以书面形式签订,但是法律、法规另有规定的除外。

行政合同的内容不得违反法律、法规、规章的规定,不得损害国家和社会公共利益, 不得违反公序良俗。

第一百零三条 行政合同依照法律、法规规定应当经其他行政机关批准或者会同办理的,经批准或者会同办理后,行政合同方能生效。

第一百零四条 行政机关有权对行政合同的履行进行指导和监督,但是不得妨碍对方当事人履行合同。

第一百零五条 行政合同受法律保护,合同当事人不得擅自变更、中止或者解除合同。

行政合同在履行过程中,出现严重损害国家利益或者公共利益的重大情形,行政机 关有权变更或者解除合同;由此给对方当事人造成损失的,应当予以补偿。

行政合同在履行过程中,出现影响合同当事人重大利益、导致合同不能履行或者难以履行的情形的,合同当事人可以协商变更或者解除合同。

1.1.2.18. 【地方政府规章】湖南省行政程序规定(法宝引证码: CLI.11.214148)

第五章 特别行为程序和应急程序

第一节 行政合同

第九十三条 本规定所称行政合同,是指行政机关为了实现行政管理目的,与公民、法人或者其他组织之间,经双方意思表示一致所达成的协议。

行政合同主要适用于下列事项: (一)政府特许经营; (二)国有土地使用权出让; (三)国有资产承包经营、出售或者出租; (四)政府采购; (五)政策信贷; (六)行政机关委托的科研、咨询; (七)法律、法规、规章规定可以订立行政合同的其他事项。

第九十四条 订立行政合同应当遵循竞争原则和公开原则。

订立行政合同一般采用公开招标、拍卖等方式。招标、拍卖适用《中华人民共和国招标投标法》、《中华人民共和国拍卖法》、《中华人民共和国政府采购法》等有关法律、法规、规章规定。

法律、法规、规章对订立行政合同另有规定的,从其规定。

第九十五条 行政合同应当以书面形式签订。

第九十六条 行政合同依照法律、法规规定须经其他行政机关批准或者会同办理 的,经过其他行政机关批准或者会同办理后,行政合同才能生效。

第九十七条 行政机关有权对行政合同的履行进行指导和监督,但是不得对当事人 履行合同造成妨碍。

第九十八条 行政合同受法律保护,行政机关不得擅自变更或者解除。

1.1.2.19. 【地方规范性文件】凉山州行政程序规定(试行)(法宝引证码: CLI .12.366360) 第五章 特别执法程序和应急程序

第一节 行政合同

第八十四条 本规定所称行政合同,是指行政机关或者其授权机构为了实现公共利益的目的,与公民、法人或者其他组织之间,经双方意思表示一致所达成的协议。

行政合同主要适用于下列事项: (一)政府特许经营; (二)国有土地使用权出让; (三)国有资产承包经营、出售或者出租; (四)政府采购; (五)政策信贷; (六)行政机关委托的科研、咨询; (七)公共工程承包合同、国家大型公共设施建设; (八)法律、法规、规章规定可以订立行政合同的其他公共管理事项。

第八十五条 订立行政合同采用公开招标、拍卖等方式。招标、拍卖适用《中华人 民共和国招标投标法》、《中华人民共和国拍卖法》、《中华人民共和国政府采购法》 等有关法律、法规、规章规定。 法律、法规、规章对订立行政合同另有规定的,从其规定。

第八十六条 行政合同应当以书面形式签订。

第八十七条 行政合同依照法律、法规规定经过其他行政机关批准或者会同办理才能生效的,应当在行政合同中载明,并不得履行。否则,行政管理方要对由此造成的损害后果承担全部责任。

第八十八条 行政机关有权对行政合同的履行进行指导和监督,但是不得对当事人履行合同造成妨碍。

第八十九条 行政合同受法律保护,行政机关不得擅自变更或者解除。

1.1.2.20. 【地方政府规章】汕头市行政程序规定(法宝引证码: CLI.11.492964)

第六章 特别行为程序

第一节 行政合同

第一百条 本规定所称行政合同,是指行政机关为了实现行政管理目的,与公民、 法人或者其他组织之间,经双方意思表示一致所达成的协议。

行政合同主要适用于下列事项: (一)政府特许经营; (二)国有土地使用权出让; (三)国有资产承包经营、出售或者出租; (四)政府采购; (五)政策信贷; (六)行政机关委托的科研、咨询; (七)行政机关与企业的战略合作; (八)法律、法规、规章规定可以订立行政合同的其他事项。

第一百零一条 订立行政合同应当遵循竞争原则和公开原则。

订立涉及有限自然资源开发利用、公共资源配置以及直接关系公共利益的特定行业的市场准入等行政合同,应当采用招标、拍卖等公开竞争方式。招标、拍卖适用《中华人民共和国招标投标法》、《中华人民共和国政府采购法》等有关法律、法规、规章规定。

法律、法规、规章对订立行政合同另有规定的, 从其规定。

第一百零二条 行政合同应当以书面形式签订。

第一百零三条 行政合同依法须经其他行政机关批准或者会同办理的,经过其他行政机关批准或者会同办理后,行政合同才能生效。

采用招标、拍卖等公开竞争方式订立行政合同,合同事项涉及行政许可的,行政机 关应当依法作出准予行政许可的决定,并颁发行政许可证件。

第一百零四条 行政机关有权对行政合同的履行进行指导和监督,但是不得对当事 人履行合同造成妨碍。

第一百零五条 行政合同受法律保护,行政机关不得擅自变更或者解除。

评价与解释:

以上四段规范分别来自于四部地方制定的行政程序规定,都是为行政合同设立的专门章节。其内容虽然大同小异,但若能结合当地的实践(如具体的行政合同的案例)进行研究,肯定会使本课题的研究更为深入。当然,这就对相关文献检索提出了更高的要求。

- 1.1.3. Legal Interpretations: legislative, judicial, and administrative interpretations (法律解释: 立法解释、司法解释、行政解释)
- 1.1.3.1. 【司法解释】最高人民法院印发《关于进一步贯彻"调解优先、调判结合"工作原则的若干意见》的通知(法宝引证码: CLI.3.134416

在不违背法律规定的前提下,除了对行政赔偿案件依法开展调解外,在受理行政机 关对平等主体之间的民事争议所作的行政裁决、行政确权等行政案件,行政机关自由裁 量权范围内的行政处罚、行政征收、行政补偿和行政合同等行政案件,以及具体行政行 为违法或者合法但不具有合理性的行政案件时,应当重点做好案件协调工作。

1.1.3.2. 【司法解释】最高人民法院关于规范行政案件案由的通知(法宝引证码:

CLI .3.52084)

(二)不作为类案件案由的构成要素和确定方法:不作为类案件的案由,原则上仍适用上述作为类案件的两种构成要素的结构,但又要体现此类案件的特色,其确定方法是:以"诉"作为此类案件案由的第一个构成要素;以行政主体的类别作为第二个构成要素,如"工商行政管理机关"、"海关"等;以不履行特定行政职责或义务作为第三个构成要素。以公安机关不履行保护人身权法定职责案为例,案由确定为"诉公安机关不履行保护人身权法定职责"。"履行……法定职责"中要求履行的是何种职责,应当根据案件的具体情况确定,如可以具体区分为"诉××(行政主体)不履行保护人身权(财产权)法定职责"、"诉××(行政主体)不履行行政合同义务"、"诉××(房屋管理机关等)不履行登记法定职责"等等。

评价与解释:

上列的两部司法解释均涉及行政合同案件,但均是在承认已有行政合同案件实践的前提下对裁判过程中的相关问题作出的程序性解释。换言之,这些司法解释并不涉及对行政合同与民事合同之间关系的实体性判定。

1.1.3.3. 【地方司法文件】江苏省高级人民法院关于为促进我省中小民营企业健康发展提供司法保障的意见(法宝引证码: CLI.13.493052)

妥善审理招商引资合同纠纷案件,推动中小民营企业优化发展布局。招商引资是地方政府发展地方经济的重要途径,招商引资合同是固定招商引资成果,明确双方权利义务关系的重要形式。正确区分地方政府与投资人签订的招商引资合同的性质,政府对投资者提供物的出让价格优惠、赠与或政府承诺提供担保的,按民事合同纠纷处理;政府在招商引资合同中承诺为投资人提供政策上的优惠或税费上减免等,视为行政合同。中小民营企业作为投资方已经履行了合同约定的投资义务,要求地方政府履行在招商引资合同中承诺的优惠条件或优惠政策的,人民法院应予支持;地方政府对于其承诺的事项没有权限或超越权限,事后又未能获得上级政府及有权部门追认或批准的,依法认定无效,投资方要求赔偿损失的,应当根据过错责任的大小确定赔偿责任。

评价与解释:

上列内容仅为地方高级人民法院出台的司法性文件,并非司法解释,但是不仅涉及了如何界定行政合同、民事合同的实体性内容,还规定了在相应情况下应当作出怎样的裁判。该文件对于本论文的写作有重要的借鉴作用,相较其他文献,更直击重点。

1.1.4. Cases (案例)

1.1.4.1. 大庆市振富房地产开发有限公司与大庆市人民政府债务纠纷案([2006]民一终字第 47 号,此案为最高人民法院公报案例)(法宝引证码: CLI.C.72481)

评价与解释:

最高人民法院在本案中对双方当事人的地位、合同关系进行了论述,从 而将双方当事人之间的合同排除于民事合同关系之外。虽然最高院并未直接 指明该合同是否属于行政合同,但是其裁判已经提供了相应的判定标准。主 要判决理由如下所列。 第一,本案双方当事人在优惠政策制定和履行中地位不平等,不属于民法意义上的平等主体。……上述案件事实表明,市政府在制定和执行优惠政策方面居于支配和主导地位。振富公司虽然具有是否承担讼争项目建设的决定权,以及对优惠政策如何理解、如何执行的建议权,但从整体上讲,在介入方式、优惠政策制定及如何履行优惠政策等方面,振富公司居于次要和服从的地位,双方当事人尚未形成民法意义上的平等主体之间的民事关系。

第二,本案双方当事人之间没有形成民事合同关系。……市政府制定的办公会议纪要(二)明确了优惠政策原则和优惠政策方案,是本案讼争供热建设项目得以执行的主要依据,但该优惠政策是市政府单方制定的,未邀请振富公司参加市政府办公会议并与之平等协商,也未征得振富公司同意,市政府作出的单方意思表示,没有振富公司的意思配合。因此,市政府办公会议纪要等相关文件不是双方平等协商共同签订的民事合同。

综上,尽管本案双方当事人之间讼争的法律关系存在诸多民事因素,但终因双方当事人尚未形成民法所要求的平等主体关系,市政府办公会议关于优惠政策相关内容的纪要及其文件不是双方平等协商共同签订的民事合同,故本案不属于人民法院民事案件受理范围。……

1.1.4.2. 泸州立达房地产开发有限公司诉泸州市国土资源局解除土地出让合同案([2011] 泸行终字第 23 号)(法宝引证码: CLI.C.827553)

评价与解释:

四川省泸州市中级人民法院在本案中对土地出让合同的性质作出了判定,认为是"行政许可的一环"。这与引出本论文的爱克福得案似有较大的出入。鉴于我国并没有形成判例制度,故无法从数据库了解相应案件的历史。这就需要我在文献检索过程中花费更多的力气进行甄别。本案涉及土地出让合同性质的判决理由如下。

针对本案而言,土地拍卖后所签订的成交确认书,确认的是竞得人主体,是法定必经程序。该确认行为因不合法而被撤销,后一个环节无论合同当事人在签订合同时的行为是否合法,均失去合法存在的基础。……国有建设用地使用权的出让,属于行政许可行为,签订土地出让合同是行政许可的一个环节,理应受到《行政许可法》的调整。当被上诉人事后发现行政许可不合法时应当依法予以纠正。

- 1.1.5. Government Agencies in charge (相关的政府主管部门)
- 1.1.5.1. 《最高人民法院民二庭庭长宋晓明就在全国民商事审判工作会议中提出的若干疑难问题答记者问——加强调查研究,探索解决之道》(法宝引证码: CLI.AR.2439)

关于民事合同与行政合同的界限划分问题。实务中经常遇到当事人之间争议的合同属于民事合同还是行政合同,是否能够依据民事诉讼程序解决争议的的问题。行政合同是指行政机关为履行职责与公民、法人或其他组织通过协商而形成的公法上的协议。从形式要件来看,行政合同的当事人必定有一方是行使国家行政权的行政机关,行政合同的内容是行政机关与相对人共同协商、双方意思表示达成一致的结果。从实质要件来看,行政合同主要涉及履行行政机关的职能、公共利益、行政权力以及公民的平等参与,其有严格的程序规制。行政合同与民事合同的区分标准主要包括主体标准、目的标准与行政优益权标准三种。(1)主体标准,即主体之一是否为行政机关。(2)目的标准,即签订合同的目的是为公共利益还是签约主体的个体私利。行政合同的目的是实现行政机关的行政职责,完成行政任务,为公共利益;而民商事合同签订的目的是为了合同主体的个体利益。(3)行政优益权标准,即从合同主体是否享有行政优益权进行判断。换言之,在合同的签订、履行、解除、终止过程中,行政机关是否居于主导地位,行政职权是否

在合同履行中起主导作用,行政主体是否享有合同的发起权、合同履行的监督权和指挥权、单方面变更合同权、单方面解除合同权等。在其权利义务的约定上,是否体现行政管理关系,是否具有不对等性。行政机关享有行政优益权,合同内容体现出不平等的行政管理关系,则为行政合同,反之,则为民商事合同。

评价与解释:

上列内容仅为最高院民二庭庭长的一次答记者问,并不是正式的司法文件, 遑论是司法解释。但是其为民事合同与行政合同的界限划分问题作出了相对周延和完整的阐释,非常值得在本论文的写作过程中思考。

1.2. Secondary Sources (二次资源)

- 1.2.1. Books: scholarly and practicing materials (图书: 学术与实务) ³
- 1.2.1.1. 施建辉:《行政契约缔结论》,法律出版社 2011 年版。

本书分为八章,涵盖了行政契约缔结的各个方面,包括:行政契约及其缔结之意义、行政契约的缔结原则、行政契约的缔结规则、行政契约的形式与缔结方式、行政契约的缔结程序、行政契约的缔结效果——成立与生效、行政契约的权利义务设置、行政契约的缔约过失责任。虽然本书并未设专门的章节讨论行政合同与民事合同的关系,但是每个章节都渗透着对于这两者的比较思考。另外,本书的参考文献中,大部分都是民事合同的著作与论文。可见,本书虽然名为"行政契约缔结论",但实际上是在对民事合同缔结论的基础上写成的;读完本书,自然可以对行政合同、民事合同各自的缔结有深入的了解。

1.2.1.2. 步兵:《行政契约履行研究》, 法律出版社 2011 年版。

本书分为五章,涵盖了行政契约履行的各个方面,包括:行政契约履行的一般解说、不同效力行政契约的履行、行政契约履行中的特权及其控制、行政契约旅行中的变更与解除、不履行行政契约的责任。本书设置了专门的部分探讨行政契约在履行过程中与民事合同的关系,如"行政契约的履行规则——对私法规则的借鉴"、"特权与契约精神的融合"、"行政法属性的契约责任"、"私法契约对规则原则的选择"。这些部分是本论文写作过程中的研究突破点。另外,结合引出本论文的案例,本书第四章"行政契约中的变更与解除"亦是重点。

1.2.1.3. 蔺耀昌:《行政契约效力研究》, 法律出版社 2010年版。

本书分为六章,较上列两本著作更为全面地介绍了行政契约制度,包括: 导论、行政契约的成立与瑕疵、行政契约的生效及效力内容、行政契约的无效、行政契约的撤销、行政契约的解除、违反行政契约之责任。我认为,本书虽然名为"行政契约效力研究",但实则更像是一本"行政契约总论",有些名不副实。但是,本书中有不少将行政合同与民事合同相比较的部分,如"行政契约的瑕疵——私法契约的瑕疵"、"公私法比较视野下行政契约的瑕疵"、"行政契约的效力内容——公私法上法律行为的效力比较"、"行政契约无效的法定情形——私法契约无效规则的援用"、"行政契约接触的条件——私法契约解除条件之借鉴"。另外,本书还附有四个"个案分析",对于本文的写作也是不错的素材。

1.2.1.4. 余凌云主编: 《全球时代下的行政契约》,清华大学出版社2010年版。

本书汇集了由清华大学法学院公法研究中心举办的"全球时代下的行政契约"学术研讨会的参会论文。十余位作者根据自身对于行政契约的研究,从不同角度探究了全球时代的行政契约;其中,不少作者采用了比较法的方法。卢超的《经由"内部契约"的

³ 特别说明:鉴于书籍内容将不被直接地引用,本部分将在列明每本书籍信息之后直接写出评价与解释。

公共治理: 英国实践——评戴维斯的Accountability: A Public Law Analysis of Government by Contract》一文尤其值得参考。

1.2.1.5. 杨解君编:《法国行政合同》, 复旦大学出版社 2009 年版。

本书是目前国内第一部全面、系统而细致地介绍法国行政合同的著作,其内容分为两部分构成:一是法国行政合同的制度,涉及法国行政合同的概念与发展、行政合同与私法合同的界分标准、法律渊源与法律规则、行政合同的主要种类及其具体应用、公共行政的合同化及其应用、行政合同案件及其争讼制度、行政合同的责任等内容;二是法国行政合同的实务,包括了三份法国行政合同文书。除了"行政合同与私法合同的界分标准"外,本书对法国行政合同的主要种类之介绍相当有益,比单纯地介绍相关理论生动得多。

1.2.1.6. 杨解君主编:《中国行政合同的理论与实践探索》, 法律出版社 2009 年版。

本书分为八章,实则也是一本"行政合同总论",包括: 行政合同一般理论探讨、 行政机关之间的行政协议探讨、行政合同的缔结探讨、行政合同的效力、行政合同责任 探讨、行政合同纠纷的解决机制探讨、行政合同诉讼中的证据问题探讨、行政合同在行 政活动中的应用探讨。值得注意的是,本书附录中收录了《人民法院审理行政合同的法 律规则——具体条款及理由说明(试拟稿)》。我注意到,相关理由说明中大量引用了《合 同法》的内容;换言之,该试拟稿本身就是研究民事合同与行政合同关系的一条途径, 因为我可以从《合同法》中哪些内容被该试拟稿吸收观察出这两者间的关系。

1.2.1.7. 余凌云: 《行政契约论》(第2版),中国人民大学出版社2006年版。

本书分为"理论构建"、"对行政契约的司法审查"、"实例研究"和"附录"四部分,从理论和实践两方面对行政契约进行了研究。其中,作者对"民法原理在行政契约中的援用"作了较为细致的论述,对于民事合同与行政合同的关系研究有较高的参考价值。特别需要指出的是,作者具有深厚的英美法背景,故此书中引用的英美法文献与判例均不失为找到相应的英文资源的一条捷径。

1.2.1.8. 李永然:《工程承揽契约:政府采购与仲裁实务》,台湾永然文化出版股份有限公司 2009 年版。

本书的作者李永然是一名执业律师,其深感"民法"上二十余个条文无法解决承揽契约中的各种问题,加之"政府采购法"的颁行,因此撰写本书以厘清承揽契约与政府采购中的种种问题。本书分为七篇,包括:承揽契约基本概念、承揽人之契约与业务、政府采购基本概念、政府采购之招标、决标、政府采购之履约、争议与仲裁、附录。本次法律文献检索所得的大多数素材均来自于学界,"书卷气"较浓;本书则从政府采购与仲裁实务出发,以执业律师的视角提出并解决相应的问题,定会为我打开新的视角。

1.2.1.9. 台湾行政法学会主编:《行政契约之法理:各国行政法学发展方向》,台湾行政法学会 2009 年版。

台湾行政法学会于 2007 年 7 月举办了 "行政契约与民间参与公共建设适用之行政法理" 学术研讨会, 议题含: 公平会与台湾微软行政和解契约之定性检讨、在学关系的法性质、行政契约违法之法律效果、行政合作法之建制与开展。本书即是这次学术研讨会的论文集, 以下文章均从不同方面对行政契约进行了一定程度的探讨: 纪振清《公平会与台湾微软行政和解契约之定性检讨》, 李仁淼《在学关系的法性质——以学校与学生的在学契约为中心》, 盛子龙《行政契约违法之法律效果——兼论 ETC 建置及运营契约违法之法律效果》, 詹镇荣《行政合作法之建制与开展——以民间参与公共建设为中心》。其中, 我对盛子龙的文章尤其有兴趣, 认为 ETC 是研究行政契约的一个突破点, 因为其不单涉及行政契约的相关内容, 更与宪法上人身自由等有着重要的关系, 同时也有着丰富的行政法内容。

1.2.1.10. 罗昌发:《政府采购法与政府采购协定论析》,元照出版有限公司 2008 年版。本书虽然具有相当高的专业性,但是作者仍然从公私法界分的角度提出了自己的思考。正如作者指出:"政府采购法是一部相当特殊的法律,由于其实质上涉及购买、租赁、委任或承揽等内容,所以牵涉许多私法的问题;另由于其涉及相关的行政程序,所以也牵涉相当多的行政法问题。研究私法的学者对这个法律会有兴趣,研究公法的学者常亦表现对这部法律的关切与兴趣。不同领域的学者对这部法律的研究,自然有不同的研究心得。"本书作者并非正统行政法学专业出身,他的观点定会为我等行政法学专业学生提供全新的思考。

- 1.2.1.11. 杨解君:《行政契约与政府信息公开: 2001 年海峡两岸行政法学术研讨会实录》,东南大学出版社 2002 年版。
- 1.2.1.12. 张树义:《行政合同》,中国政法大学出版社 1994 年版。
- 1.2.1.13. 施建辉、步兵著:《政府合同研究》,人民出版社 2008 年版。
- 1.2.1.14. 王克稳:《政府合同研究》, 苏州大学出版社 2007 年版。
- 1.2.1.15. 苏林琴:《行政契约:中国高校与学生新型法律关系研究》,教育科学出版社 2011 年版。
- 1.2.1.16. 月旦法学教室(第六十七期),《行政契约请求权的贯彻与行政契约的争讼》, 元照出版公司 2008 年版。
- 1.2.1.17. 月旦法学教室(第五十二期),《行政契约的概论 票据债权与通常债权》,元照 出版公司 2007 年版。
- 1.2.1.18. 台湾行政法学会主编:《行政契约与新行政法》,台湾行政法学会 2002 年版。
- 1. 2. 1. 19. 胡叔宝:《契约政府的契约规则》中国社会科学出版社 2004 年版。⁴
- 1.2.2. Dissertations (硕士或博士学位论文) ⁵
- 1.2.2.1. 邹志臣:《行政契约基础理论法哲学研究——以公法与私法的衔接为视角》, 吉林大学 2006 年博士学位论文。

本文立足公、私法相链接这一新的理论视角论述了行政契约的成因与性质,提出了契约理念融入现代行政法的法理基础,阐释了行政契约的法律控制问题,并以行政征收制度为切入点实证性地探讨了契约理念在行政行为中的适用。其次,结合上述宏观性的制度法理指导我国行政契约的制度构建,简要地提出了行政契约的立法形式及制度设计构想,最后,本文指出了行政契约是现代行政法公法与私法交融的表现,公私交融是现代行政法发展的趋势,我国传统的行政法的观念需要改变。

1.2.2.2. 陈逸新:《行政合同的契约理论分析——契约原理在行政合同中的价值与限度》, 吉林大学 2011 年硕士学位论文。

本文从契约理论的实质入手,剖析行政合同的性质,对将契约理论引入行政合同的合理性、可行性予以论证,探寻契约理论的引入对行政合同的作用。契约理论引入行政合同具有合理性和可行性。契约的基本原则如合同自由原则、平等原则、诚实信用原则都可以在行政合同中运用。契约的多项制度也可以引入行政合同为其所用。契约理论对行政合同的作用主要体现在私契约理论中的契约自由原则的引入,保证行政合同当事人在行政合同缔约与履行的过程中应享有的自由意志,尤其是可以保证行政合同对方当事人的合法权利。

1.2.2.3. 王小琴:《行政契约的法理本源探析》,山西大学2005年硕士学位论文。 随着商品经济的发展,民事领域的契约所蕴涵的自由、公平、诚信等精神也成熟起

⁴ 特别说明:因为种种原因,我未能找到以上9本书(1.2.1.11-1.2.1.19),也没能进行全面的阅读并写出评价与解释。但在我完成论文过程中,定会再花时间进行研读。

⁵ 特别说明:由于论文文本将不会被直接引用,本部分将在列明每篇论文信息之后直接写出评价与解释。

来,逐步跨越了私法的边界而渗透到了公法领域。作为公法重要组成部分的行政法也深深浸润着契约精神,其典型代表就是行政契约。它体现了行政法对民主精神的升华、公平理念的追求和诚信原则的承袭。虽然行政契约发端于民事领域,但它又与民事契约有很大的不同。其中最主要的区别在于为了维护公共利益,允许行政主体一方享有一些特权。这种权力因素与契约精神的交织与融合,也正是行政契约的魅力所在。本文借鉴了国外关于行政契约特权的研究成果,对我国行政契约中行政主体享有的特权进行了简单归纳,包括单方选择权、监督权、单方变更或解除契约权、制裁权等。在行政主体享有行政特权的同时,还引进具体的私法原则,同时创设出适用于公法的契约规则,以期有化行政特权的色彩,达到行政特权与契约精神的良性互动,实现利益与个人利益的平衡。

- 1.2.2.4. 翟海英:《论行政合同中的行政主体优先权》,黑龙江大学2010年硕士学位论文。 行政合同中行政主体的优先权问题是行政合同理论的核心问题。本文从行政合同的概念入手,分析了其所具有的特征。指出了其在称谓上的诸多差别,主要包括行政合同优先权和行政合同特权等。进一步分析了行政合同优先权的性质,指出了其权力的本质属性。并在行政合同优先权的基本理论之上,介绍了目前我国行政合同优先权的立法现状,并指出了其在实践过程中所存在的问题。
- 1.2.2.5. 李颖轶: 《行政合同优益权研究》, 华东师范大学2009年硕士学位论文。

本文旨在尝试推翻我国行政法学界长久以来存在的行政合同中政府享有优益权的 观点,并尝试在行政合同的制度设计方面提出一些有价值的观点和见解。本文首先介绍 了目前我国行政法理论中存在的行政合同以及行政合同优益权,并总结其形成的背景和 原因。但这样移植的科学性和合理性却是值得商榷的,我国行政合同优益权存在着严重 的立论缺失。从比较法的视角来看,通过对德国行程序法中涉及行政合同的规范分析、 法国行政合同若干理论介绍、英美公共合同法制度的简述可以得出结论,行政合同优益 权不存在普适性。

1.2.2.6. 李晓光: 《行政合同中行政主体特权研究》, 苏州大学2004年硕士学位论文。

行政合同中行政主体拥有特权是行政合同制度的最重要特征。行政合同特权在行政合同的成立、运用、救济的过程中发挥着重要作用。发挥行政合同的优越功能和积极作用,必须要规范行政合同,作为行政合同重要内容的行政合同特权制度也必须要建构和完善。行政合同中公共利益优先与公共利益受阻的矛盾为行政合同特权的存在提供了合理的空间,为了保障公共利益和行政合同管理目标的实现必须赋予行政主体以特权。当前诸多国家都对行政合同特权作了肯定的规定,但对于特权的具体配置模式不尽相同,多受各国的法律传统、文化背景、民族特色的影响。

1.2.2.7. 张媛: 《论行政合同特权之来源、范围及其规制》,中国政法大学2009年硕士学位论文。

行政合同特权是行政合同的核心制度,也理应属于行政法问题。在现代行政中,为了克服合同双方性、平等性、协商性的局限,维持行政对社会公共事务进行管理的本质,在非常情况下当公共利益的实现遭到相对方阻碍,行政目标的实现受到影响时,有必要赋予行政主体有限的、适度的合同特权。作为维护公共利益最低底线的单方变更和解除合同权没有得到普遍确立,关于变更及解除权的法律规定中没有明显的"单方性",更多地"沿袭"了民事合同的规定,强调双方对变更和解除权的平等享有、协商解决。在行政合同特权的立法设定中,必须界清理论界通常认为的"行政合同特权",哪些权力属于真正的行政合同特权,哪些属于合同权利,各项合同特权的来源方式属于法定或约定。

1.2.2.8. 吴小军:《论行政合同的公法性》,南京师范大学2006年硕士学位论文。 与一般民事合同不同的是,行政合同一方面蕴涵着传统的契约精神,但另一方面又 反映了行政主体将其行政职权作用于他人权益的特殊法律行为形式,是行政职权受合同规则调整的特殊法律状态。这样,就使得行政合同制度表现出公法规则与私法规则的有机结合,并始终呈现出公法性与私法性的双重属性特征,进而又有别于民事合同行政合同的本质属性表现为公法性。行政合同的公法性主要表现为行政主体在行政合同的缔结、履行中享有不同程度的优益权,同时也受到行政法的一些规制。

1.2.2.9. 毛建军: 《论行政合同中相对人的权利及其保护》,对外经济贸易大学2006年硕士学位论文。

作为一种更柔和、更富有弹性的行政管理方式,行政合同具有不同于民事合同的特点。但基于合同的共性,民事合同的基本原则和制度对行政合同仍有适用的空间。由于行政合同的行政性,极可能会出现行政主体滥用行政权力的现象,同时,为了社会公共利益的需要,也可能会损害合同相对人的权利。为了保障行政相对人的合法权益不被非法侵犯,必须对行政相对人的合法权益进行事前以及事后救济。事后救济,主要应通过行政复议和行政诉讼以实现对行政相对人权利的最终保护。

1.2.2.10. 蔺耀昌: 《行政契约撤销问题研究》,武汉大学2005年硕士学位论文。

行政契约撤销问题,是构建我国行政契约法制时必须予以系统研究和解决的重大理论问题。本文最重要的乃第二章与第三章:第二章从行政契约的合法要件入手,系统分析了行政契约合法要件之缺失对行政契约效力的影响,在此基础上归纳出导致行政契约可撤销的具体原因;第三章立基于行政契约之特性,在借鉴私法契约撤销权的性质理论及法制的基础上,分析了作为行政契约当事人的行政主体、作为行政契约当事人的公民、法人或者其他组织及行政契约第三人所享有的行政契约撤销权的不同性质,为构建行政契约撤销程序奠定了理论基础。

1.2.2.11. 范文进:《行政契约中的权利义务配置研究》,西南政法大学2006年硕士学位 论文。

本文从制度、学说以及实践中的种种困惑与矛盾出发进行思考:究竟为什么在现实与理论存在如此激烈矛盾的情况下,行政契约制度仍然能蓬勃发展,显现出如此旺盛的生命力。笔者指出,这是因为行政契约制度的出现顺应了新的时代潮流,是对传统和经典理论的突破与发展,其内容与形式是现实具体情况的客观需要。真正能够反映行政契约本质的理论,都不可能是固守传统的机械解释,它只能是以行政契约实践经验为根据的理论概括与总结,人们在不得不适用行政契约的实践过程中不自觉的依照客观情况的需要对其内容进行填充与发展,而这种顺其自然所产生的基本内容框架大致满足了行政契约基本价值之需求,因而这种倍受理论非议与实践困扰的制度依然能顽强的生存发展且不断突破。

1.2.2.12. 杨福韬: 《我国乡镇公共服务外包中的行政合同研究》,华东师范大学2008 年硕士学位论文。

自2003年以来,湖北省委、省政府借鉴西方国家的公共服务合同外包制度,对湖北省乡镇基层事业单位进行市场化改革,通过一系列的改革措施不但精简了机构、提高了行政效率,还大大提高了乡镇行政给付水平。由于目前缺乏对该项法律制度的规范性定性和系统化研究,同时由于契约行政尚未成为我国行政法制中的一项完备的制度,还没有专门的法律和法规对各方的权利和义务关系进行规范和调整,所以一定程度上导致了该项制度在法律概念界定、形式效力、合同签定、合同履行、合同救济、合同监督等方面出现了法律控制上的缺位,一定程度上影响了该项法律制度行政效能的发挥。基于以上原因,本文对湖北省乡镇公共服务合同外包制度进行系统的法律分析和研究。本文最重要的乃第三部分。该部分以行政契约理论为基础,从乡镇公共服务外包行政合同的形式内容、合同签订、合同履行、合同救济等方面研究和发现其中存在的法律问题。

- 1.2.3. Law review articles (法学评论文章)
- 1.2.3.1. 邢鸿飞:《政府特许经营协议的行政性》,《中国法学》2004 年第 6 期。(法宝引证码: CLI.A.12414)

本文在对政府特许经营协议的主要形式进行介绍和分析的基础上,从政府特许经营协议主体的特定性、政府特许经营协议目的的公益性、政府特许经营协议适用规则的公法属性入手,分析了政府特许经营协议的行政性,认为政府特许经营协议是一种行政性(或公法上的)契约,是借助契约手段实现行政目标的行政合同。宏观上看,政府特许经营在提供公共服务、优化资源配置、拓宽融资渠道等方面的作用,无不体现其行政性和公益性。从微观角度,在特定案件中,政府特许经营的行政性和公益性,同样可以通过在契约中保留政府特权或主导性权利的条款来实现。

1.2.3.2. 钱水苗、巩固:《论环境行政合同》,《法学评论》2004 年第 5 期。(法宝引证码: CLI.A.124452)

本文对环境行政合同的性质作出了深入的论述。行政性是环境行政合同的基本特性,此特性使其区别于民事合同;环境性是环境行政合同区别于其他行政合同的特征;合同性是行政合同区别于通常的行政管理方式的根本特性,是其优势赖以发挥的关键。环境行政合同制度完善之关键在于如何在"环境性"要求下,实现"行政性"与"合同性"的有机协调、完美结合。为此,一个总的基本原则是"坚持行政性,发挥合同性"。在合同订立、实施的不同阶段,其特性应各有侧重。

1.2.3.3. 刘晓霞:《我国行政合同的适用范围及相关问题探析》,《甘肃政法学院学报》2002 年第4期。(法宝引证码: CLI.A.184209)

通过对行政合同的产生、行政合同适用范围在我国及国外的理论与实践以及与行政合同密切相关的几个问题的探讨,我行政合同适用范围的界定是一件较困难的事,同时也说明了行政合同的广泛性、开放性、发展性及灵活性。其一,行政合同适用于非权力行政行为、积极行政行为领域,以区别于行政命令、规制行政、消极行政。其二,行政合同适用于非权力政府经济行为领域,以体现国家对经济的调控与干预。如政府采购合同。其三,行政合同适用公共利益,公共服务等所谓公务的领域。其四,行政合同适用于给付行政领域包括社会保障领域。其五,行政合同适用于直接为执行公务的双方的行政行为。这就排除了政府签订的民事合同。其六,行政合同适用于一方为行政机关,一方为行政相对人的为行政管理目的而直接执行公务的合同。

1.2.3.4. 李昭:《德法行政合同制度之比较》,《河北法学》2004 年第 3 期。(法宝引证码: CLI.A.119285)

法国通过成文法规定了一些重要的行政合同,并通过行政法院的判例确立了其他识别行政合同的标准,从而建立了适用范围广泛的行政合同制度。由于受法国行政法上根深蒂固的公共利益优先观念的影响,法国行政合同制度在价值取向上更注重对公共利益的保护,相对而言行政性较强,合意性则有所不足。表现在法律规定上,主要就是行政机关享有许多当然的法定单方特权;相比之下,合同双方当事人之间权利义务配置的不平等性非常明显。

德国通过成文法的形式明确规定了行政合同的含义和识别标准,并通过法院判例对 其作出的扩大解释扩展了行政合同的适用范围,使得行政合同作为一种与行政行为并列 的行政活动被广泛地应用于行政实践之中。但与法国的行政合同相比,其适用范围仍然 较窄。德国的行政合同更强调双方当事人地位的平等性,主要通过双方约定的方式来配 置合同的权利义务,并对公共利益和个人利益实行同等法律保护,既符合了合同的本质 要求,同时也更加体现出现代契约行政的民主精神。

1.2.3.5. 张宁:《由民法学者的质疑而引起的对行政合同的再思考》,《河北法学》2004年

第6期。(法宝引证码: CLI.A.119497)

合同的起源并不是因为合同主体之间的平等,而是源于不同主体之间利益互补的需要,这才是合同精要之所在。行政合同并没有混淆市场交易行为与国家对市场交易的管理行为,而恰恰是将这两种行为融合在一起。尽管行政合同存在着种种问题,但随着理论与实践日臻完善,这一管理方式终将成为现代政府进行公共事务管理的必然选择。

1.2.3.6. 湛中乐、刘书燃:《PPP 协议中的法律问题辨析》,《法学》2007 年第 3 期。(法宝 引证码: CLI.A.1114088)

PPP协议中反映了公共部门与私人部门之间对于公共服务的买卖合同关系,还反映了私人部门作为公共服务的生产者和经营者与公共部门作为公共服务市场的监管者之间的管理与被管理关系。在 PPP 模式中,政府至少承担着三重角色的责任和义务: 规则的制定者与执行者、公共服务的采购者和提供者、公共服务的监管者等。特许经营协议履行过程中,除行政主体方通过行政行为方式侵害私人部门权益等个别情形外,应当允许当事人自由选择通过公法或者私法方式来解决由此引发的法律争议。

1.2.3.7. 杨卓敏:《城市公共交通民营化的法律问题》,《法学》2004 年第 7 期。(法宝引证码: CLI.A.1127071)

城市公共交通作为民营化改革中一种特殊而敏感的行业,需要小心谨慎地在"促进公交行业有序竞争"和"方便城市市民出行"之间寻求一个平衡点。本文从分析公共交通的特性、其民营化的现状及与立法的关系入手,运用法学、行政学原理和相关国内、国外范本,对涉及公交民营化法律和制度上的六大问题予以探讨。

1.2.3.8. 于安:《我国政府采购法的合同问题》,《法学》2002 年第 3 期。(法宝引证码: CLI.A.1126889)

对政府采购合同性质的分歧意见,集中在政府采购合同属于普通的民事债权合同,还是特殊的行政合同。有关方面起初对此所持立场比较客观,兼顾两方面主张的优点。认为政府采购合同一般应当作为民事合同,同时还指出,应当注意到政府采购资金属于财政性资金,采购目的是为了公共事务,政府采购还具有维护公共利益,加强财政支出管理、抑制腐败等功能,政府采购合同又不完全等同于一般的民事合同,需要在明确适用合同法的前提下,对政府采购合同的有关特殊问题作出规定。但是后来这一立场发生了重大变化,规定政府采购合同适用合同法,对其他特殊规定也作了改变,这可以理解为政府采购合同被认为完全是民事合同。

1.2.3.9. 于立深:《通过实务发现和发展行政合同制度》,《当代法学》2008 年第 6 期。(法 宝引证码: CLI.A.1119180)

我国行政合同法典化和制度性发展遇到了困难,除了必须妥善处理与民事合同的关系之外,还须对行政合同制度的实践发展进行实证性的总结,严谨地描述行政合同制度的实务现状。通过国家政策、国家立法和司法实务三个层面的考察、勾勒和研判,可以发现行政合同制度是内生于我国现实土壤的一种制度选择,各级政府已经把行政合同作为一种新的社会治理工具,不同层次的立法规范确认了行政合同制度的法律地位,司法政策也已经承认了行政合同制度。

1.2.3.10. 肖北庚:《论政府采购合同的法律性质》,《当代法学》2005 年第 4 期。(法宝 引证码: CLI.A.14492)

《政府采购法》将政府采购合同定位为民商事合同,似乎是对政府采购合同在宏观上具有民商事合同的某些性质作了准确定位。然而,微观分析这一定位,可以发现它既未反映合同类型化的法制演进逻辑,更与政府采购合同国际发展趋势不一致。政府采购合同的本质属性明显有别于民商事合同,属行政合同。

1.2.3.11. 叶伟平:《行政合同纠纷几个法律问题探讨》,《行政法学研究》2005 年第 3 期。

(法宝引证码: CLI.A.113252)

行政合同与民事合同的区别主要体现在合同目的是否具有公益性、合同内容是否受公法调整。非行政合同当事人由于不具有实体上的请求权,与行政主体之间不具有法律上的因果关系,故无权提起行政诉讼。行政合同起诉期限应当借鉴民事合同诉讼时效的规定,区分有效和无效行政合同,采取不同的起诉期限计算方法。行政合同违约赔偿,是一种行政赔偿,在赔偿范围上应以原告实际经济损失为限。

1.2.3.12. 左然:《乡镇公共服务中的行政合同研究》,《行政法学研究》2006 年第 1 期。 (法宝引证码: CLI.A.113310)

行政合同在乡镇政府行政管理中的运用,标志着我国基层政府管理方式由单一行政管理手段向法律管理手段的重大转变。引起乡镇政府行为方式转变的深刻原因,一是以取消农业税费为主要内容的农村经济体制改革;二是乡镇公共服务和公益事业发展体制均改革。由于乡镇文化环境及干部的认识和管理水平的限制,在运用行政合同中存在诸多问题,这应当引起足够重视,并加以完善,以推动这场重要变革。

1.2.3.13. 赵宏:《试论行政合同中的诚实信用原则》,《行政法学研究》2005 年第 2 期。 (法宝引证码: CLI.A.113282)

从行政合同的契约本质考虑,诚实信用原则当然可以适用于行政合同;从行政合同的行政性来看,诚实信用原则适用于行政合同有利于规制行政特权的恣意行使。对于历来强调国家的优越地位,缺乏对个人权利保护和平等地位尊重传统的我国,在行政合同理论和实践中倡导诚信原则更具意义。具体适用时,一方面要借鉴诚实信用原则在私法合同中的适用,另一方面更要注重诚信原则对行政机关在行政合同中进行公益裁量、行使行政特权时的有效约束。

1.2.3.14. 何渊:《论行政协议》,《行政法学研究》2006年第3期。(法宝引证码:

CLI.A.113343)

与行政合同不同的是,行政协议本质上是一种对等性行政契约。它的缔结,主要是合作各方的事,中央政府无法越俎代庖。但行政协议法这一制度平台是地方政府无能为力的,只能由中央政府来构筑和提供。只有制定行政协议法,中央政府才能对地方政府的协作实现法律监控,地方政府间的合作也才能稳固和得到法律保障。

1.2.3.15. 张明军:《论行政主体的缔约责任——民法缔约过失理论在行政合同制度中的引入与适用》,《行政法学研究》2004年第4期。(法宝引证码: CLI.A.113219)

借鉴民法上的缔约责任,行政主体的缔约责任是行政主体在缔结行政合同过程中超越缔约规则,违反缔约义务,给另一方相对人或第三人的利益造成损害所应承担的法律责任。行政主体缔约责任的理论基础是诚信原则和信赖保护原则,其中信赖保护的范围更广。行政主体承担缔约责任的前提是违反了缔约义务,包括确保缔约程序公正的义务和确保合同合法有效的义务。损害赔偿是行政主体承担缔约责任的方式。

1.2.3.16. 杨欣:《论行政合同与民事合同的区分标准》,《行政法学研究》2004 年第 3 期。 (法宝引证码: CLI.A.113176)

合同定性的不同,直接决定其适用规则与救济渠道的差异。我国现行行政合同与民事合同的区分标准,就总体而言,偏于抽象,操作性不强。西方国家行政合同与民事合同的区别标准多元且具有成文化趋势。借鉴西方经验,我国行政合同与民事合同的区分,应以合同是否具有公法性质为判断中心,以公权力因素与公益因素作为主要判断基准,建立多元的具有操作性的规则体系。

1.2.3.17. 王文英:《试论政府采购合同的性质》,《行政法学研究》2003 年第 3 期。(法宝引证码: CLI.A.113107)

政府采购合同包括货物采购合同、服务采购合同和工程采购合同。就其性质而言,

公共工程采购合同及由行政机关决定执行特定经济社会政策目标的货物采购合同、服务 采购合同和其他工程采购合同为行政合同,其余为民事合同。从发展趋势看,作为民事 合同的政府采购合同占较大比重,这并不意味着政府采购合同中行政合同种类可有可 无,而是特定政府采购合同中公共利益优先的必然要求。

1.2.3.18. 蔡乐渭:《BOT 中的行政法问题研究》,《行政法学研究》2003 年第 3 期。(法 宝引证码: CLI.A.113091)

从 BOT 特许协议的特性看, 此类合同完全符合行政合同的要件。但是, 在制度层面, 我国现有的规范民事合同的法律法规如《民法通则》、《合同法》等并不足以涵盖 BOT 特许协议。由此, 得出 BOT 特许协议在法律性质上为行政合同的结论当无疑问。然而, BOT 特许协议从总体上看, 还是一种行政许可行为。

2. U.S. Legal Sources (choose at least one foreign country) (美国法律资源)

- 2.1. Primary Sources (原始资源)
 - 2.1.1. Statutes (法律)
 - 2.1.1.1. 5 U.S.C.A. § 553 Rule making (Title 5. Government Organization and Employees, Part I. The Agencies Generally, Chapter 5. Administrative Procedure, Subchapter II. Administrative Procedure, § 553. Rule making)
 - (a) This section applies, according to the provisions thereof, except to the extent that there is involved--(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

评价与解释:

《美国联邦行政程序法》(Administrative Procedure Act, APA)是我所接触到的美国行政法内容中最熟悉的部分,但是其中并没有对行政合同作出相应的规定。上列规定则进一步排除了公共合同(public contracts)在规则制定(rule making)中的适用。这要求我在法律文献检索过程中要进一步检索其他不熟悉的材料。

- 2.1.1.2. 40 U.S.C.A. § 585 Lease agreements (Title 40. Public Buildings, Property, and Works, Subtitle I. Federal Property and Administrative Services, Chapter 5. Property Management, Subchapter V. Operation of Buildings and Related Activities, § 585. Lease agreements)
 - (a) In general.--
 - (1) Authority.--The Administrator of General Services may enter into a lease agreement with a person, copartnership, corporation, or other public or private entity for the accommodation of a federal agency in a building (or improvement) which is in existence or being erected by the lessor to accommodate the federal agency. The Administrator may assign and reassign the leased space to a federal agency.
 - (2) Terms.--A lease agreement under this subsection shall be on terms the Administrator considers to be in the interest of the Federal Government and necessary for the accommodation of the federal agency. However, the lease agreement may not bind the Government for more than 20 years and the obligation of amounts for a lease under this subsection is limited to the current fiscal year for which payments are due without regard to section 1341(a)(1)(B) of title 31.
 - (b) Sublease .--

- Application.--This subsection applies to rent received if the Administrator-
 (A) determines that an unexpired portion of a lease of space to the
 Government is surplus property; and
 - (B) disposes of the property by sublease.
- (2) Use of rent.--Notwithstanding section 571(a) of this title, the Administrator may deposit rent received into the Federal Buildings Fund. The Administrator may defray from the fund any costs necessary to provide services to the Government's lessee and to pay the rent (not otherwise provided for) on the lease of the space to the Government.
- (c) Amounts for rent available for lease of buildings on Government land.--Amounts made available to the General Services Administration for the payment of rent may be used to lease space, for a period of not more than 30 years, in buildings erected on land owned by the Government.

评价与解释:

上列内容规定了政府向其他主体租赁(lease)办公场地的权限(authority)、依据(terms)、转租(sublease)以及租金使用(use of rent)。值得注意的是,此种租赁合同与一般的民事租赁合同有些不同,如缔约时必须从政府的利益出发(in the interest of the Federal Government and necessary for the accommodation of the federal agency)、租金的使用有着严格的限制(deposit rent received into the Federal Buildings Fund)等。这与普通民事合同的契约自由精神有所不同,彰显了行政合同的特殊性。另外,该条规定的有关年限的特殊规定也值得研究。

- 2.1.1.3. 41 U.S.C.A. §8102 (41 USCA § 701) Drug-free workplace requirements for Federal contractors (Title 41. Public Contracts, Subtitle IV. Miscellaneous, Chapter 81. Drug-Free Workplace)
 - (a) In general.--
 - (1) Persons other than individuals.--A person other than an individual shall not be considered a responsible source (as defined insection 113of this title) for the purposes of being awarded a contract for the procurement of any property or services of a value greater than the simplified acquisition threshold (as defined insection 134 of this title) by a Federal agency, other than a contract for the procurement of commercial items (as defined in section 103 of this title), unless the person agrees to provide a drug-free workplace by--(omitted.)
 - (2) Individuals.--A Federal agency shall not make a contract with an individual unless the individual agrees not to engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

评价与解释:

上列内容规定了可与联邦政府机构 (Federal agencies) 订立公共合同 (public contracts) 的对象范围。值得注意的是,其中还提及了商业采购 合同 (a contract for the procurement of commercial items), 这显然 与民事合同有所联系。

- (b) Suspension, termination, or debarment of contractor.--
- (1) Grounds for suspension, termination, or debarment.--Payment under a contract awarded by a Federal agency may be suspended and the contract may be terminated, and the contractor or individual who made the contract with the agency may be suspended or debarred in accordance with the requirements of this section, if the head of the agency determines that--
 - (A) the contractor is violating, or has violated, the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1); or
 - (B) the number of employees of the contractor who have been convicted of violations of criminal drug statutes for violations occurring in the workplace indicates that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a).
- (2) Conduct of suspension, termination, and debarment proceedings.--A contracting officer who determines in writing that cause for suspension of payments, termination, or suspension or debarment exists shall initiate an appropriate action, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures. The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual.
- (3) Effect of debarment.--A contractor or individual debarred by a final decision under this subsection is ineligible for award of a contract by a Federal agency, and for participation in a future procurement by a Federal agency, for a period specified in the decision, not to exceed 5 years.

评价与解释:

上列内容规定了公共合同的暂停履行(suspension)、终止履行(termination)以及禁令(debarment)的适用情形及相应后果。以上内容具有明显的行政合同特点,如能与合同法规范相比较,定会对本论文的写作有很大的帮助。

2.1.2. Regulations (行政法规)

2.1.2.1. 2 C.F.R. § 182.630 Debarment (Title 2. Grants and Agreements, Subtitle A. Office of Management and Budget Guidance for Grants and Agreements, Chapter I. Office of Management and Budget Governmentwide Guidance for Grants and Agreements, Subchapter G. National Policy Requirements, Part 182. Governmentwide Requirements for Drug - Free Workplace (Financial Assistance), Subpart F. Definitions, § 182.630 Debarment.)

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 C.F.R. part 9, subpart 9.4) and agency regulations implementing the OMB guidance on non-procurement debarment and sus-pension (2 C.F.R. part 180, which implements Executive Orders 12549and12689).

2.1.2.2. 2 C.F.R. § 1401.230 Debarment (Title 2. Grants and Agreements, Subtitle B. Federal Agency Regulations for Grants and Agreements, Chapter XIV. Department of the Interior, Part 1401. Requirements for Drug – Free Workplace (Financial Assistance), Subpart B. Definitions, §1401.230 Debarment.)

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 C.F.R. part 9, subpart 9.4) and 2 C.F.R. part 180.

2.1.2.3. 2 C.F.R. § 182.670 Suspension (Title 2. Grants and Agreements, Subtitle A. Office of Management and Budget Guidance for Grants and Agreements, Chapter I. Office of Management and Budget Governmentwide Guidance for Grants and Agreements, Subchapter G. National Policy Requirements, Part 182. Governmentwide Requirements for Drug - Free Workplace (Financial Assistance), Subpart F. Definitions, § 182.670 Suspension.)

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 C.F.R. part 9, subpart 9.4) and agency regulations implementing the OMB guidance on non-procurement debarment and suspension (2 C.F.R. part 180, which implements Executive Orders 12549 and 12689). Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

2.1.2.4. 2 C.F.R. § 1401.270 Suspension (Title 2. Grants and Agreements, Subtitle B. Federal Agency Regulations for Grants and Agreements, Chapter XIV. Department of the Interior, Part 1401. Requirements for Drug - Free Workplace (Financial Assistance), Subpart B. Definitions, § 1401.270 Suspension.)

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 C.F.R. part 9, subpart 9.4) and 2 C.F.R. part 180. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

评价与解释:

上列内容分别是禁令(debarment)与暂停履行(suspension)的两个定义。经对比可以发现,它们各自的定义还是有所不同的。如要全方面地研究 C. F. R. 中有关禁令、暂停履行的内容,搜集、对比不同定义对于本论文的写作也是有益的,从中可以发现不同行政领域中行政合同的特点。

2.1.2.5. 2 C.F.R. Pt. 220, App. A to Part 220 (Title 2. Grants and Agreements, Subtitle A. Office of Management and Budget Guidance for Grants and Agreements, Chapter II. Office of Management and Budget Circulars and Guidance, Part 220. Cost Principles

for Educational Institutions (OMB Circular a – 21), Appendix A to Part 220 Principles for Determining Costs Applicable to Grants, Contracts, and Other Agreements With Educational Institutions)

Omitted.

评价与解释:

上列内容是一个附录,规定了美国政府预算管理局(Office of Management and Budget, OMB)对教育机构(educational institutions)的授予、与教育机构签订的合同及其他协议中的成本确定原则。该段内容可以与具体案例相结合,从而与单纯的民事合同案例作出对比。

2.1.2.6. 43 C.F.R. § 3138.10 (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Part 3130. Oil and Gas Leasing: National Petroleum Reserve, Alaska, Subpart 3138. Subsurface Storage Agreements in the National Petroleum Reserve-Alaska (NPR-A), § 3138.10 When will BLM enter into a subsurface storage agreement in NPR-A covering federally-owned lands?)

BLM will enter into a subsurface storage agreement in NPR-A covering federally-owned lands to allow you to use either leased or unleased federally-owned lands for the subsurface storage of oil and gas, whether or not the oil or gas you intend to store is produced from federally-owned lands, if you demonstrate that storage is necessary to--

- (a) Avoid waste; or
- (b) Promote conservation of natural resources.

评价与解释:

上列内容规定了土地管理局 (Bureau of Land Management) 可以与相对人订立地下储藏合同 (subsurface storage agreement) 的情形。值得注意的是,若要和土地管理局订立此类合同,相对人还需要证明自身的情形属于 (a) 或 (b) 其中的一种;相对人的证明是否足以说服土地管理局,则可能取决于土地管理局的单方决定。很显然,此类地下储藏合同混杂了契约自由与行政机关单方决定权,具有行政合同的基本特征,是值得研究的行政合同样本之一。

- 2.1.2.7. 43 C.F.R. § 3138.11 How do I apply for a subsurface storage agreement? (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Part 3130. Oil and Gas Leasing: National Petroleum Reserve, Alaska, Subpart 3138. Subsurface Storage Agreements in the National Petroleum Reserve-Alaska (NPR-A), § 3138.11 How do I apply for a subsurface storage agreement?)
 - (a) You must submit an application to BLM for a subsurface storage agreement that includes--
 - (1) The reason for forming a subsurface storage agreement;
 - (2) A description of the area you plan to include in the subsurface storage agreement;
 - (3) A description of the formation you plan to use for storage;

- (4) The proposed storage fees or rentals. The fees or rentals must be based on the value of the subsurface storage, injection, and withdrawal volumes, and rental income or other income generated by the operator for letting or subletting the storage facilities;
- (5) The payment of royalty for native oil or gas (oil or gas that exists in the formation before injection and that is produced when the stored oil or gas is withdrawn);
- (6) A description of how often and under what circumstances you and BLM intend to renegotiate fees and payments;
 - (7) The proposed effective date and term of the subsurface storage agreement;
- (8) Certification that all owners of mineral rights (leased or unleased) and lease interests have consented to the gas storage agreement in writing;
 - (9) An ownership schedule showing lease or land status;
- (10) A schedule showing the participation factor for all parties to the subsurface storage agreement; and
- (11) Supporting data (geologic maps showing the storage formation, reservoir data, etc.) demonstrating the capability of the reservoir for storage.
- (b) BLM will negotiate the terms of a subsurface storage agreement with you, including bonding, and reservoir management.
- (c) BLM may request documentation in addition to that which you provide under paragraph (a) of this section.

评价与解释:

上列内容规定了地下储藏合同(subsurface storage agreement)的申请步骤。其中,(a)所列的11项内容可谓常规的合同条款。值得注意的是,(b)(c)两项则显示了土地管理局在订立合同过程中的部分单方决定权,行政合同所显示的不平等性在这里得以体现。

2.1.2.8. 43 C.F.R. § 3217.10 What are unit agreements? (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Group 3200. Geothermal Resources Leasing, Part 3200. Geothermal Resource Leasing, Subpart 3217. Cooperative Agreements, § 3217.10 What are unit agreements?)

Under unit agreements, lessees unite with each other, or jointly or separately with others, in collectively adopting and operating under agreements to conserve the resources of any geothermal reservoir, field, or like area, or any part thereof. BLM will only approve unit agreements that we determine are in the public interest. Unit agreement application procedures are provided in part 3280 of this chapter.

评价与解释:

上列内容给出了一体化合同(unit agreement)的定义,其中明确提及, 只有当土地管理局(Bureau of Land Management)确认该合同是为了公共 利益而缔结的,才会批准该合同。这不仅涉及到行政合同的公益性,更体现 了土地管理局在批准合同时所拥有的单方决定权。

2.1.2.9. 43 C.F.R. § 3137.111 When will BLM extend the primary term of all leases committed to a unit agreement or renew all leases committed to a unit agreement? (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of

Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Part 3130. Oil and Gas Leasing: National Petroleum Reserve, Alaska, Subpart 3137. Unitization Agreements--National Petroleum Reserve-Alaska, Obligations and Extensions, § 3137.111 When will BLM extend the primary term of all leases committed to a unit agreement or renew all leases committed to a unit agreement?)

If the unit operator requests it, the BLM will extend the primary term of all NPR-A leases committed to a unit agreement or renew the leases committed to a unit agreement if any committed lease within the unit is extended or renewed under § § 3135.1-5 or 3135.1-6. If the BLM approves a lease renewal under § 3135.1-6(b), the BLM will require a renewal fee of \$100 per acre for each lease in the unit that is renewed.

评价与解释:

上列内容规定了何种情况下土地管理局会延长租赁期限。值得注意的是,开发者(operator)提出要求,土地管理局才会考虑延长的问题。另外,土地管理局也可以据此收取一笔费用(a renewal fee),而这笔费用是无法通过合意更改的。行政机关在行政合同履行过程中的特权于此又有体现。

2.1.2.10. 43 C.F.R. § 3137.15 If the Federal lands constitute less than 10 percent of the lands in the proposed unit area, is the unit agreement subject to Federal regulations or approval?(Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Part 3130. Oil and Gas Leasing: National Petroleum Reserve, Alaska, Subpart 3137. Unitization Agreements--National Petroleum Reserve-Alaska, Application, § 3137.15 If the Federal lands constitute less than 10 percent of the lands in the proposed unit area, is the unit agreement subject to Federal regulations or approval?)

If the Federal lands constitute less than 10 percent of the lands in the proposed unit area--

- (a) You may use a unit agreement approved by the State and/or a native corporation;
- (b) BLM will authorize commitment of the Federal lands to the unit if it determines that the unit agreement protects the public interest; or
- (c) As unit operator you may ask BLM to approve and administer the unit. If BLM agrees to approve and administer the unit, you must follow, and BLM will administer, the regulations in this subpart and 43 CFR part 3160.

评价与解释:

上列内容规定了订立一体化合同(unitization agreement)的过程中,如果联邦土地不足拟进行一体化区域土地的10%,该合同是否还符合联邦行政法规或联邦的批准?该条列出了在此种情况下可能采取的三种措施。值得注意的是第二种措施中,出现了对公共利益(public interest)的考量,这又是行政合同的一个重要特征。

2.1.2.11. 43 C.F.R. § 3217.12 What does BLM need to approve my communitization agreement?(Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior,

Subchapter C. Minerals Management(3000), Group 3200. Geothermal Resources Leasing, Part 3200. Geothermal Resource Leasing, Subpart 3217. Cooperative Agreements, § 3217.12 What does BLM need to approve my communitization agreement?)

For BLM to approve a communitization agreement, you must give us the following information:

- (a) The location of the separate tracts comprising the drilling or spacing unit;
- (b) How you will prorate production or royalties to each separate tract based on total acres involved;
 - (c) The name of each tract operator; and
 - (d) Provisions for protecting the interests of all parties, including the United States.

评价与解释:

上列内容土地管理局批准群体化合同(communitization agreement)时相对人需要提供的信息。(a)(b)(c)仍属常规信息的范畴,但是(d)要求相对人提供保护所有当事人、包括美国利益的条款。至于相对人提供的条款是否能够保护相关利益,则又取决于土地管理局的单方决定;由此可见,行政合同的特征在群体化合同上又有体现。

2.1.2.12. 43 C.F.R. § 3217.11 What are communitization agreements? (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Group 3200. Geothermal Resources Leasing, Part 3200. Geothermal Resource Leasing, Subpart 3217. Cooperative Agreements, § 3217.11 What are communitization agreements?)

Under communitization agreements (also called drilling agreements), operators who cannot independently develop separate tracts due to well-spacing or well development programs may cooperatively develop such tracts. Lessees may ask BLM to approve a communitization agreement or, in some cases, we may require the lessees to enter into such an agreement.

评价与解释:

上列内容定义了何谓群体化合同(communitization agreement)。有意思的是,订立群体化合同既有可能是由承租人先向土地管理局提出,也有可能是土地管理局要求承租人订立。可见,在群体化合同的订立过程中,契约自由精神得到了较大程度的彰显。

- 2.1.2.13. 43 C.F.R. § 3217.13 When does my communitazation agreement go into effect? (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Group 3200. Geothermal Resources Leasing, Part 3200. Geothermal Resource Leasing, Subpart 3217. Cooperative Agreements, § 3217.13 When does my communitization agreement go into effect?)
 - (a) Your communitization agreement is effective when BLM approves and signs it.
 - (b) Before we approve the agreement:

- (1) All parties must sign the agreement; and
- (2)(i) We must determine that the tracts cannot be independently developed; and (ii) That the agreement is in the public interest.

评价与解释:

上列内容规定了群体化合同生效的要件。土地管理局的批准、合同要符合公共利益这两项要件再次佐证群体化合同是行政合同的一种典型。

- 2.1.2.14. 43 C.F.R. § 3137.100 How must I allocate production to the United States when a participating area includes unleased Federal lands? (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Part 3130. Oil and Gas Leasing: National Petroleum Reserve, Alaska, Subpart 3137. Unitization Agreements--National Petroleum Reserve-Alaska, Production Allocation, § 3137.100 How must I allocate production to the United States when a participating area includes unleased Federal lands?)
 - (a) When a participating area includes unleased Federal lands, you must allocate production as if the unleased Federal lands were leased and committed to the unit agreement (see §§ 3137.80 and 3137.81 of this subpart). The obligation to pay royalty for production attributable to unleased Federal lands accrues from the later of the date the--
 - (1) Committed leases in the participating area that includes unleased Federal lands receive a production allocation; or
 - (2) Previously leased tracts within the participating area become unleased.
 - (b) The royalty rate applicable to production allocated to unleased Federal lands is the greater of 12 1/2 percent or the highest royalty rate for any lease committed to the unit.
 - (c) The value of the production must be determined under the Minerals Management Service's oil and gas product value regulations at 30 CFR part 206.

评价与解释:

上列内容规定了在参与区域(participating area)包含未出租的联邦 土地的情况下,参与开发者也需要将未出租的土地当做是已经出租的、并且 已经签订了一体化合同,进而才能进行生产分配等内容。虽然该条规定与一 体化合同的关系并不是特别密切,但是其要求开发者遵守一体化合同的约 定,是否也是一体化合同的另一种适用方式?此种适用方式究竟是行政机关 单方作出的行政行为,抑或是含有部分双方合意的行政合同呢?这又是一个 值得研究的命题。

- 2.1.2.15. 43 C.F.R. § 3101.5-2 Coordination lands (Title 43. Public Lands: Interior, Subtitle B. Regulations Relating to Public Lands, Chapter II. Bureau of Land Management, Department of the Interior, Subchapter C. Minerals Management(3000), Part 3100. Oil and Gas Leasing, Subpart 3101. Issuance of Leases, § 3101.5. National Wildlife Refuge System Lands, § 3101.5-2 Coordination lands.
 - (a) Coordination lands are those lands withdrawn or acquired by the United States and made available to the States by cooperative agreements entered into between the Fish and

Wildlife Service and the game commissions of the various States, in accordance with the Act of March 10, 1934 (48 Stat. 401), as amended by the Act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the Fish and Wildlife Service as the custodial agency of the United States.

(b) Representatives of the Bureau and the Fish and Wildlife Service shall, in cooperation with the authorized members of the various State game commissions, confer for the purpose of determining by agreement those coordination lands which shall not be subject to oil and gas leasing. Coordination lands not closed to oil and gas leasing shall be subject to leasing on the imposition of such stipulations as are agreed upon by the State Game Commission, the Fish and Wildlife Service and the Bureau.

评价与解释:

上列内容规定了何谓协调用土地(coordination land)。协调用土地的一种来源便是长期租赁或合同(long-term leases or agreements)。虽然该条规定与相关行政合同没有太大的关系,但至少向我们展示了土地租赁合同在其他领域的广泛运用。

2.1.2.16. 48 C.F.R. 9

Chapter 1. Federal Acquisition Regulation

Subchapter B. Acquisition Planning

Part 9. Contractor Qualifications

Subpart 9.1. Responsible Prospective Contractors

9.108 Prohibition on Contracting with Inverted Domestic Corporations.

Subpart 9.2. Qualifications Requirements

Subpart 9.3. First Article Testing and Approval

9.304 Exceptions.

9.308 Contract Clauses.

Subpart 9.4. Debarment, Suspension, and Ineligibility

9.406 Debarment.

9.407 Suspension.

9.409 Contract clause.

Subpart 9.5. Organizational and Consultant Conflicts of Interest

9.503 Waiver.

9.504 Contracting officer responsibilities.

9.505 General rules.

9.506 Procedures.

9.507 Solicitation Provisions and Contract Clause.

9.508 Examples.

Subpart 9.6. Contractor Team Arrangements

Subpart 9.7. Defense Production Pools and Research and Development Pools 9.702 Contracting with pools.

评价与解释:

《联邦征收条例》(Federal Acquisition Regulation)是本次法律文献检索中搜索到的与行政合同有关的、最为完整的联邦行政法规。其中对于行政合同的各方面作出了规定,上列条款标题便是我认为与行政合同最有关系的一些内容。鉴于该条例篇幅较大,不宜全部罗列,故我仅选取一些我认为较为重要的条款,具体列出如下。

• 48 C.F.R. 9.000 Scope of part. (See also 48 C.F.R. 9.100 Scope of subpart.)

This part prescribes policies, standards, and procedures pertaining to prospective contractors' responsibility; debarment, suspension, and ineligibility; qualified products; first article testing and approval; contractor team arrangements; defense production pools and research and development pools; and organizational conflicts of interest.

- 48 C.F.R. 9.102 Applicability.
- (a) This subpart applies to all proposed contracts with any prospective contractor that is located--(1) In the United States or its outlying areas; or (2) Elsewhere, unless application of the subpart would be inconsistent with the laws or customs where the contractor is located.
- (b) This subpart does not apply to proposed contracts with (1) foreign, State, or local governments; (2) other U.S. Government agencies or their instrumentalities; or (3) agencies for the blind or other severely handicapped (see subpart 8.7).
 - 48 C.F.R. 9.103 Policy.
- (a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.
- (b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of non-responsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see subpart 19.8.)
- (c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.
- 2.1.3. Cases (判例)
- 2.1.3.1. United States v. Winstar Corp., 518 U.S. 839 (1996)

The Supreme Court, Justice Souter, announced the judgment of the Court and held that: (1) United States was contractually obligated to permit financial institutions to use special accounting methods with regard to their acquisitions of failing thrifts, despite regulatory changes, pursuant to agreements with federal regulatory agencies; (2) United States breached contracts to permit financial institutions to use special accounting methods with regard to

their acquisitions of failing thrifts when its agencies, pursuant to FIRREA (Financial Institutions Reform, Recovery, and Enforcement Act of 1989), barred use of those methods; (3) doctrine of unmistakability did not bar contracts' enforcement, inasmuch as they neither bound government's exercise of authority to modify banking regulation or other sovereign power, and awarding damages would not be tantamount to such limitation; (4) United States' liability for breaching contracts was not precluded under reserved powers doctrine, inasmuch as contracting agencies did not strip United States of its legislative sovereignty when they contracted to assume risk of loss resulting from future regulatory changes; (5) lack of express delegation of purported authority to fetter United States' sovereign power to regulate banking did not render contracts ultra vires, in that agencies' assumption of risk of loss resulting from future regulatory changes did not surrender such power; (6) contracting agencies had statutory authority to assume risk of loss resulting from regulatory changes; (7) FIRREA was not "public and general" act for purposes of sovereign acts defense; and (8) even if FIRREA was "public and general" act, legal impossibility defense did not apply so as to protect United States from liability.

评价与解释:

United States v. Winstar Corp. 是我在法律文献检索过程中发现的、在行政合同领域中影响最为重大的案例。该案的历史颇为反复,相关的案例数目也很庞大。本案的判决理由明确指出,政府在缔结行政合同后应履行相应的义务 (United States was contractually obligated to permit financial institutions to use special accounting methods with regard to their acquisitions of failing thrifts, despite regulatory changes); 违反合同后,也应当承担相应的赔偿责任 (United States' liability for breaching contracts was not precluded under reserved powers doctrine)。

2.1.3.2. Conner Bros. Const. Co., Inc. v. Geren, 550 F.3d 1368 (Fed.Cir. Dec 31, 2008)

The Court of Appeals, Bryson, Circuit Judge, held that: (1) commander's exclusion order was sovereign act precluding governmental liability, and (2) COE (Army Corps Of Engineers) had no contractual duty to issue suspension of work order in response to government's sovereign act.

评价与解释:

在 Westlaw 中,本案属于 United States v. Winstar Corp. 一案的 negative citing reference (declined to extend),排除了 COE 的合同责任,给出的理由亦十分简单,未见细致的分析。

2.1.3.3. Holmes v. United States., 92 Fed.Cl. 311 (Fed.Cl. Apr 15, 2010)

The Court of Federal Claims, Hewitt, Chief Judge, held that:(1) settlement agreements were not money-mandating source required for Tucker Act jurisdiction, and (2) breach of settlement agreements claims were time-barred.

评价与解释:

在 Westlaw 中,本案属于 United States v. Winstar Corp.一案的 negative citing reference (declined to extend)。可惜的是,法官在探讨违约问题时仅指出相关的诉求已经罹于时效(time-barred),而未就合同的具体事项有进一步的论述。

2.1.3.4. Lurline Gardens Ltd. Housing Partnership v. United States, 37 Fed.Cl. 415 (Fed.Cl. Feb 28, 1997)

The Court of Federal Claims, Weinstein, J., held that: (1) there was no contract between developers and Commissioner in which Commissioner agreed to permit prepayment after 20 years; (2) Commissioner did not have authority to enter into contract to permit prepayment irrespective of any future regulatory amendments; and (3) regulations that parties agreed were to rule Regulatory Agreements provided that prepayment was not permitted.

评价与解释:

在 Westlaw 中,本案属于 United States v. Winstar Corp. 一案的 negative citing reference (distinguished)。法官在本案中清楚地界定了在开发商与行政专员 (Commissioner) 之间并无合同关系,且行政专员也无允许预付 (permit prepayment) 的缔约权限。

2.1.3.5. Schism v. United States, 972 F.Supp. 1398 (N.D.Fla. Jun 10, 1997)

The District Court, Vinson, Chief Judge, held that: (1) decisions of military at issue were reviewable by district court; (2) plaintiffs (retired military veterans) could maintain action under Little Tucker Act for breach of implied-in-fact contract; (3) plaintiffs could not recover under equitable estoppel theory; (4) plaintiffs could assert claim under Fifth Amendment of unjust taking without compensation; (5) claim under Age Discrimination in Employment Act (ADEA) was defeated by failure to comply with notice requirements; and (6) rational basis existed for exclusion of Medicare-eligible military retirees from Tricare program, thus defeating equal protection claim of age discrimination.

评价与解释:

在 Westlaw 中,本案属于 United States v. Winstar Corp. 一案的 negative citing reference (distinguished)。法官在本案中作出的判决 不仅涉及地方法院的管辖权,还就合同非违约方的相应后果作出了裁判。值得一提的是,该案中涉及的 Little Tucker Act 与 Age Discrimination in Employment Act 均可能与行政合同有关,值得进一步关注。

2.1.3.6. Barseback Kraft AB v. United States, Nuclear Reg. Rep. P 20,583, 121 F.3d 1475, 42 Cont.Cas.Fed. (CCH) P 77,187 (Fed.Cir. Jul 31, 1997)

The Court of Appeals, Mayer, Circuit Judge, held that: (1) USEC was not constrained to use cost-recovery pricing policy; (2) pricing policy did not violate treaties between United States and Swedish and Spanish governments respecting such services; and (3) USEC was not shown to be including charge for decontamination and decommissioning (D&D) costs.

评价与解释:

在 Westlaw 中,本案属于 United States v. Winstar Corp. 一案的 negative citing reference (distinguished)。本案涉及了瑞典、西班牙的公司与美国能源部 (Department of Energy, DOE) 的合同。值得一提的是,该案还涉及了美国与瑞典、西班牙之间签订的条约 (treaties between United States and Swedish and Spanish governments respecting such services)。这是否说明在国家条约中,也会有"跨国行政合同"的存在?其与美国国内的行政合同相比,是否又有一些特殊性?

2.1.3.7. United States.v. Essley, 284 F.2d 518, C.A.10 1960, (Nov.8, 1960)

The Court of Appeals, Pickett, Circuit Judge, held that considered as a whole, together with Mineral Lands Leasing Act, 17, 30 U.S.C.A. 226, and regulations adopted pursuant thereto, the leases clearly disclosed that the parties intended the rentals for fourth and fifth lease years to be 25 ¢ per acre, and not 25 ¢ per lease, the that cause of action for recovery of rentals provided for in such leases was not subject to state statute of limitations.

评价与解释:

本案的前因后果虽然不是太清晰,但是很明显地,法官在裁判中对租赁合同作出了相关的解释,厘清了合同条款中的不确定法律概念(the parties intended the rentals for fourth and fifth lease years to be 25¢ per acre, and not 25¢ per lease)。从行政诉讼的视角研究行政合同,或许也是一个新的视角。

2.1.3.8. Turney v. Marion County Bd. of Educ., 481 So.2d 770, Miss., 1985. (Nov.27, 1985)

The Supreme Court, Prather, J., held that: (1) prior recorded lease, which lessees chose not to sign, was void; (2) board was authorized to draw up renewal lease without request being made by lessees; (3) board was authorized to require lessees' signature on renewal lease; (4) board was authorized to impose certain conditions demanded in lease; and (5) board made no mistake in arriving at fair rental value of \$5.25 per acre, with no credit for taxes being given against the rent.

评价与解释:

与上一个案例一样,本案法官在(1)中不仅对合同是否有效作出了裁判,还在(2)、(3)、(4)中对教育委员会(Board of Education)是否有权在租赁合同履行过程中作出某些行为进行了裁判。可见,租赁合同在实践中还是有非常多的问题会产生,其并不因为合同当事人的特殊性而降低产生争议的可能性。

2.1.3.9. U.S. v. General Petroleum Corp. of Cal., 73 F.Supp. 225, D.C.Cal. 1946., (Mar. 30, 1946)

Action by United States of America against the General Petroleum Corporation of California and others for a declaratory judgment as to the authority of the Secretary of the Interior to place minimum limitations upon valuations for royalty purposes of the interests of the United States in oil and gas produced from public lands in the Kettleman Hills field of California held by the defendants under oil and gas leases, and for other relief.

Judgment in accordance with opinion. The action was dismissed as to The Texas Company and Kettleman North Dome Association.

评价与解释:

虽然本案的前因后果并不是特别明晰,但是其涉及公共土地上所产油、气 (oil and gas produced from public lands) 的使用费数目决定权归属。值得注意的是,法官还在判决中提出了要考量美国的国家利益(for royalty purposes of the interests of the United States),行政合同的特征(正如之前搜索到的法律规范所规定的)在此案中又得以显现。

- 2.2. Secondary Sources (二次资源)
 - 2.2.1. Books: scholarly and practicing materials(图书: 学术与实务)
 - 2.2.1.1. Peter Leyland, Terry Woods, Textbook on administrative law, Blackstone, 1994. 本书是一本供初学者所用的入门教材,并不是专门的行政法著作,因此铺面较广。但是,本书设立了专门的一节讨论外包(Contracting out)。总体来说,该书的借鉴意义不大。
 - 2.2.1.2. Richard J. Pierce, Administrative law treatise: 2007 cumulative supplement, Aspen, 2007.

本书涵盖了截止到 2007 年前美国行政法的各种新动向、新发展。值得注意的是,作者对 Ace Property and Casualty Ins. v. Federal Crop Insurance Corp. 这一案子给予了高度的关注。作者指出: Ace Property and Casualty Ins. v. Federal Crop Insurance Corp. (FCIC), in which the Eighth Circuit agreed with the Ninth Circuit and disagreed with the Second Circuit in holding that the statute that requires exhaustion of administrative remedies as a prerequisite to a breach of contract action against FCIC is not jurisdictional. 该案出现在了本书第 15章 Exhaustion, Finality, and Ripeness 与第 18章 Remedies中。该案对于行政救济与违约救济的衔接值得本论文在写作时进行参考。

2.2.1.3. A.C.L.Davies, The public law of government contracts, Oxford, 2008.

本书是我目前搜索到的英文文献中唯一一本针对政府合同的专著,包含的主题较为广泛,包含: Introduction, Regulation government contracts, The public law perspective, The decision to use contract, Awarding the contract, Dealing with policy changes, Contract management, Government contractors: public or private?, Social and environmental goals, Employment matters, Conclusion and future prospects. 虽然本书未设专门章节讨论民事合同和行政合同,但是其从公法(public law)视角进行的探讨必定会涉及到私法(private law),从中进行比较便是我在论文写作过程中需要关注的对象。

2.2.1.4. P.P. Craig, Administrative law, 4th ed., Sweet & Maxwell, 1999.

本书设置了专章介绍了行政合同,题为 Contract, Service Provision and Governance; 下设的节如下: Towards "better procurement": the framing of government procurement policy, Towards "better procurement": contract and service provision by central government, The private finance initiative: contract and service provision by central government, Towards "best value": contract and service provision by local government, Making the specific contract: general principles, Making the specific contract: public procurement, consumer protection and the E.C., Limits on contractual effectiveness: crown service. 作者在论述行政合同的思路与我国作者"总论——分论"式有很大的不同,这或许也能为本论文的写作提供另一条思路。

- 2.2.1.5. Peter L. Strauss, Todd D. Rakoff, Cynthia R. Farina, Gellhorn and Byse's administrative law: cases and comments, Rev. 10th ed., Foundation Press, 2003.
- 2.2.1.6. Richard J. Pierce, Administrative law, Thomson/West, 2008.
- 2.2.1.7. Stephan W. Schill, International investment law and comparative public law, Oxford University Press, 2010.

- 2.2.1.8. Carol Harlow & Richard Rawlings, Law and administration, Butterworths, 1997.
- 2.2.2. Dissertations (硕士与博士学位论文) 未找到相应的硕士与博士学位论文。
- 2.2.3. Law review articles (法学评论文章) ⁷
- 2.2.3.1. Ayoub M. Al-Jarbou, Administrative Contracts under Saudi Arabian Law, 41 Pub. Cont. L.J. 75 2011.

Saudi law acknowledges the distinction between administrative and nonadministrative government contracts. This distinction is referenced in the statutory law and clearly defined in the Board of Grievances' case law.

There are three elements that make a government contract administrative in nature: (1) an administrative authority must be a party to the contract, (2) the contract must serve the public interest or the public good, and (3) the contract must contain some special clauses not usually found in private contracts. The main types of clauses are those that show the inequality of parties, or clauses conferring a right of private entities to occupy the public domain.

The distinction between administrative and nonadministrative contracts is important because agencies have considerable power over private contractors in administrative contracts, whereas in nonadministrative contracts the Board considers the private party and the public agency to be on equal footing. In the event of a contractual dispute over an administrative contract, as long as the agency is acting in the public's interest and within its statutory limits, the Board will support the agency's actions. Thus, the distinction between administrative and nonadministrative contracts is not technical—it has real consequences for the rights of the parties involved.

评价与解释:

本文的介绍重点是沙特阿拉伯的行政合同制度,其不仅有实定法基础,还有 Board of Grievances 的案例法作为支撑。尤其值得注意的是,本文介绍了判定行政合同的三个标准:一,行政机关必须为合同一方(an administrative authority must be a party to the contract);二,该合同必须为公共利益而缔结(serve the public interest or the public good);三,该合同必须包含一些普通民事合同不包含的条款(contain some special clauses not usually found in private contracts)。本论文虽不打算包含比较法部分,但这三条具体标准仍不失为论文的宝贵素材。

2.2.3.2. Riley Snow, Federal Court of Claims Further Defines Nuclear Power Companies' Ability to Collect Damages, 24 J. Land Resources & Envtl. L. 151 2004.

As a result of this case (Commonwealth Edison Co. v. United States), power companies should note that takings arguments will be rejected, despite the length of time it takes for the government to accept and remove its waste. The government should note that although this decision favors it in the short term, it could end up paying more in damages than under condemnation if the delays continue. Furthermore, this decision bolsters the case law stating the government should be granted no deference in its interpretations of the Standard Contract

⁶ 特别说明:因为种种原因,我未能找到以上 4 本书 (2. 2. 1. 5-2. 2. 1. 8),也没能进行全面的阅读并写出评价与解释。但在我完成论文过程中,定会再花时间进行研读。

⁷ 特别说明:本部分中,我将先截取论文中的重要片段,再对全文进行评价和解释。

terms. This determination takes away any deferential treatment the government might receive and keeps it on the level of a private party. It remains to be seen whether it is good public policy to hold the government to a private contractual standard under the Standard Contract when it seeks to remedy a situation that private industry seems unable, or unwilling, to address.

评价与解释:

本文通过 Commonwealth Edison Co. v. United States, 剖析了美国各核能源公司与美国能源部之间的 (United States Department of Energy, DOE) 各种合同纠纷. 在本案中,Commonwealth Edison Co. 起诉美国政府部分违约 (a partial breach of contract regarding the acceptance, transport, and removal of spent nuclear fuel)。作者指出了政府在履行相关合同的过程应当注意的事项,并且就行政合同中双方地位的不平等是否有益进行了思考。尤其值得注意的是,本文提及了 Standard Contract, 我认为这也值得深入研究,当然,需要据此作出更为细致的文献检索。

2.2.3.3. Jacqueline Wood, Government Contractor Standards of Ethical Conduct: the Need for a More Detailed Regulatory Scheme, 36 Pub. Cont. L.J. 437 2006-2007.

By passing a comprehensive code of ethics applicable to government contractors, Congress would eliminate a major barrier to entry for unsophisticated smaller contractors and allow greater competition for government contracts. Additionally, such a system would make prosecutorial enforcement easier. A clear regulatory scheme would promote integrity in public procurement, saving taxpayer dollars and promoting public confidence in the contracting system. After all, government contractors can only accomplish so much through compliance systems and employee training if the guidance the Government provides is insufficient.

评价与解释:

本文探讨了行政合同一方——行政机关在缔结行政合同时应当注意的伦理道德规范(ethics),更呼吁要通过一部相应的、具有全面性的法典(a comprehensive code)来规范行政机关的行政合同活动。作者的视野甚至已经扩展到了刑事犯罪领域,这对于我来说又是一个新的思考方向——为何行政合同需要有特殊的伦理道德规范?为何民事合同的规范不能直接套用?

2.2.3.4. Randall James Bunn, Contractor Recovery for Current Environmental Cleanup Costs Under World War II-Era Government Contract Indemnification Clauses, 41 A.F. L. Rev. 163, 1997.

This article begins with a brief discussion of liability under Comprehensive Environmental Response Compensation and Liability Act (CERLA). Then, after a discussion of the historical basis of the World War II-era military contracts, the theory of indemnification as a basis for recovery under World War II-era contracts is explored. This article concludes with an overall assessment of the theory and its potential as a successful method of shifting liability for current environmental cleanup costs.

评价与解释:

本文探讨了二战时期政府合同补偿条款(World War II-Era Government Contract Indemnification Clauses)下的环境清理费用问题(Environmental Cleanup Costs)。虽然本文的侧重点可能更偏侵权法(torts),但是其花了不少笔墨分析了二战时期的相关军事合同(military contracts,也算是行政合同的一种),对我来说是较为有益的历史资料。

2.2.3.5. Rachel Grace Stabler, Adding Insult to Injury: Opportunities for Fraud in the Katrina-Related Government Contracts Under the False Claims Act, 58 Ala. L. Rev. 631, 2007.

As of January 8, 2007, the Federal Emergency Management Agency (FEMA) had awarded almost \$8.6 billion in contracts for Katrina-related work. Additionally, the United States Army Corps of Engineers (USACE) has granted nearly \$3.5 billion in Katrina-related contracts. With so much money being awarded by the government to private contractors, it seems likely that some fraud will be committed in the performance of these contracts. This Comment seeks to explore the possible opportunities for fraud in the government contracts awarded by FEMA and the USACE for Katrina-related work and whether such fraud would be subject to prosecution under the civil False Claims Act (FCA), the primary federal statute used to prosecute fraudulent government contractors.

评价与解释:

本文探讨了卡特里娜飓风来袭后将出现的相关行政合同 (Katrina-related government contracts)的问题,其侧重点在于政府拨款被欺诈的可能性及相应对策。本文的特殊之处在于,作者就与卡特里娜飓风的行政合同进行了深入的探讨,较泛泛探讨行政合同的文章来说更具有针对性。另外,本文还涉及了 False Claims Act (FCA)。值得注意的是,作者将该法律定位为民事法律规范(civil);这又涉及到民事法律规范对行政合同的渗透,颇具研究价值。

2.2.3.6. Sheryl L. Floyd, William M. Jack, Heather Kilgore Weiner and Deanna M. Remmes, A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summary: 2008 Government Contract Law Decisions of the Federal Court, 58 Am. U.L. Rev. 1051, April, 2009.

In 2008, the U.S. Court of Appeals for the Federal Circuit issued 242 precedential opinions. Of these, twenty-two were government contract cases. This article discusses all twenty-two precedent-setting opinions involving government contract law issues, setting forth the relevant facts, the Federal Circuit's analysis, and, where appropriate, the ramifications of these cases. The decisions are grouped into the following categories: jurisdiction, bid protests/preferences, contract formation, contract interpretation, contract performance/breach, assignment of claims, damages, attorneys' fees, and attorney sanctions.

评价与解释:

本文可谓是一篇探讨行政合同案例的综述性文章, 其仔细分析了 22 个案例中的法律问题, 覆盖面相当广, 包含了管辖权 (jurisdiction)、投标抗议/偏好(bid protests/preferences)、合同缔结 (contract formation)、合同解释 (contract interpretation)、合同履行/违约 (contract performance/breach)、债权让与 (assignment of claims)、损害赔偿 (damages)、律师费 (attorney's fees)、律师制裁 (attorney sanctions)等内容。上述每一部分下,都有相关的案例支撑论述。

2.2.3.7. Jody Freeman, The Contracting State, 28 Fla. St. U. L. Rev. 155, 2000.

In the United States, federal, state, and local governments now routinely employ contracts with private providers to furnish services, deliver benefits, and perform significant

(and sometimes traditionally "public") functions. Less visibly, a number of federal agencies have begun experimenting with contractual approaches to regulation as well, sometimes pursuant to statutory mandates, and other times as part of agency enforcement discretion. Governments increasingly act in all of their capacities, it seems, via contractual devices.

Despite the rising prominence of contract as an administrative and regulatory instrument, its implications for administrative law are not well understood. In this Article, I begin a much-needed discussion of contractual governance by focusing on two species of contract—contracts to provide services or benefits and regulatory contracts. I explain the practical and the theoretical problems these contracts pose, chief among which is their potential to undermine accountability in decision-making.

评价与解释:

Jody Freeman 是当代美国著名的行政法学者,其《合作治理与新行政法》(Cooperative Administration and New Development Direction of Modern Administrative Law)一书在国内行政法学界享有盛名。本文提出了 contracting state 这一宏大命题,但没有仅在宏观层面对行政合同进行宽泛的论述,而是将行政合同进一步分为提供服务与利益的政府合同(contracts to provide services or benefits)与管制合同(regulatory contracts)两类进行论述。

2.2.3.8. David B. Hatch, BLM, Stop Dithering Over Federal Oil and Gas Leases: Why the Leases Must Be Issued within 60 Days, 31 Utah Envtl. L. Rev. 461, 2011.

Over the past decade, the traditional method for leasing federal lands for onshore oil and gas exploration seems to have hit a wall. It has become a matter of practice for wildlife and environmental groups to protest nearly every parcel of land the Bureau of Land Management (BLM) submits to a federal oil and gas lease sale. These protests require a lot of time and effort by the BLM and its staff to review each claim in order to determine which, if any, have any merit. Despite the BLM's practice to carefully review and select lands through its resource management plans and environmental studies, these protests often cause the BLM to attach further stipulations to lands, postpone leasing the lands, or eliminate the lands entirely from the lease sale. What is most troubling is the BLM's recent practice to hold the leases, even after they have been purchased, in order to continue its review of the environmental protests. During this time, the lease payments are held in a sort of limbo where neither the federal government nor the successful bidder has access to the funds. The end result is massive delay in the development of oil and gas, affecting the productivity of oil and gas companies, the revenue of state and federal governments, the jobs in local communities, and diminished access to resources that are vital for our fuel and transportation needs.

The problem is that the BLM does not have any authority to hold these leases after they have been purchased at a lease sale. Federal law is clear that the BLM must issue a lease within 60 days following the successful bidder's payment. The BLM is overstepping its authority when it does not issue a lease within 60 days of payment. While the BLM has discretion to lease federal lands before a lease sale, and should use that discretion when the lands will be negatively impacted by oil and gas development, the BLM does not have discretion to withhold or delay the issuance of a lease after the lease sale takes place.

评价与解释:

在前期的资料检索中,土地管理局(Bureau of Land Management)经常会在法律规范中出现。从法律规范中,我只能了解到"静态"的土地管理局;然而,从这篇文章中,我开始了解到在租赁实务中"动态"的土地管理局。在土地管理局的部分职权(authority to hold these leases after they have been purchased at a lease sale)不明晰的情况下,土地管理局可能作出了违背立法本意的行为。本文对特定情况进行了区分,并得出了土地管理局在租赁已经达成的前提下并没有相关裁量权的结论(BLM does not have discretion to withhold or delay the issuance of a lease after the lease sale takes place)。

2.2.3.9. Bruce M. Pendery, BLM's Retained Rights: How Requiring Environmental Protection Fulfills Oil and Gas Lease Obligations, 40 Envtl. L. 599, 2010.

There are approximately 39,000,000 acres of federal mineral estate in the eleven western states subject to onshore oil and gas leases issued by the Bureau of Land Management (BLM). The leases grant the lessee the right to extract any oil or natural gas that may be found on the lease. However, the leases make the grant of rights "subject to" a number of reservations of authority to the federal government. The BLM lease provides that these retained rights stem from applicable laws; the terms, conditions, and stipulations in the lease; the Secretary of Interior's regulations and formal orders in effect when the lease is issued; and regulations and formal orders issued afterward if not inconsistent with the lease rights granted. A BLM regulation makes the lease subject to three further reservations of authority: stipulations; restrictions deriving from specific, nondiscretionary statutes; and reasonable measures the BLM authorized officer might require. A review of these authorities shows BLM retains substantial rights allowing it to regulate the time, place, and manner of oil and gas development. Development can be conditioned by regulating the timing of operations and the siting and design of facilities, as well as specification of the rates of oil and gas development and production. BLM can suspend operation of leases and can even prohibit development if impacts are substantially different or greater than normal. BLM retains the right to prevent "adverse impacts" by requiring "reasonable measures" to prevent environmental harms. ... This Article argues that given the mandatory, nondiscretionary nature of many of the authorities a federal onshore oil and gas lease has been made subject to, not only does BLM have numerous retained rights, it in fact has an obligation to fully assert them, and several policy changes that could accomplish this are suggested.

评价与解释:

本文作者跳出了法律规范的桎梏,从动态的角度梳理出土地管理局在租赁实务中所保有的各种可以由法律规范引出的、隐含的权利(the leases make the grant of rights "subject" to a number of reservations of authority to the federal government)。然而,作者又清晰地指出,在享有这些权利的同时,土地管理局更需要履行相应的义务。可见,在行政合同双方当事人之间,虽然行政机关看似是强势一方,但是基于权利与义务对等的原则,强势一方也需要肩负起相应的义务,尤其要为了公共福祉而履行。

2.2.3.10. Laura Lindley, Of Teapot Dome, Wind River and Fort Chaffee: Federal Oil and Gas Resources. 10-SUM Nat. Resources & Env't 21, 1995.

The leasing system as ultimately adopted in the 1920 Act distinguished between known petroleum lands and "wildcat" lands. In "known geologic structures," leases were to be issued competitively for a fixed term of twenty years with the right to renew and a maximum size of 640 acres. On wildcat lands, a permit system was established. ...Revenues from the leasing system were to be allocated as follows: 521/212 percent to the Reclamation Fund, 371/212 percent to the state in which the lands are located, and 10 percent to the federal treasury. The allocation has since been amended and revenues are now distributed (in the lower forty-eight states) 50 percent to the states, 40 percent to the Reclamation Fund, and 10 percent to the U.S. treasury.

评价与解释:

本文介绍了租赁制度适用的两种不同的土地: 已知的藏有石油的土地与"野猫"土地。两种类型土地的具体制度区别表明。行政机关对于不同的公共土地会采用不同的方式订立行政合同;换言之,行政合同的订定也需要"量体裁衣"。另外,本文亦提及了租赁收入的分配,较上列法律规范而言,更具体、更具有操作性。

2.2.3.11. James B. Martin, The Interrelationships of the Minerals Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: a Conflict in Search of Resolution, 12 Envtl. L. 363, 1982.

The essential features of oil and gas leasing are as follows: within the known geologic structure of a producing oil or gas field, all lands must be leased to the highest responsible qualified bidder. The term of these leases is five years. Thereafter, these leases extend for as long as oil or gas is produced in paying quantities. Lands that are not within a known geologic structure of a producing oil or gas field must be leased to the first qualified applicant. These leases are not subject to competitive bidding. The term of these leases is ten years. Thereafter, these leases also extend for as long as oil and gas is produced in paying quantities.

评价与解释:

跟上文一样,本文亦涉及了两种不同性质土地的不同租赁方式。当然,本文的重点是在于探讨矿藏土地租赁法 (Minerals Lands Leasing Act)、 荒地法 (Wilderness Act), 濒危物种法 (Endangered Species Act) 之间的冲突。

2.2.3.12. Robert A. Nelson, Oil and Gas Leasing on Forest Service Lands: a Question of NEPA Compliance, 3 Pub. Land L. Rev. 1, 1982.

A. Historical Development

The first national law to establish policy concerning exploitation of minerals was the Mining Law of 1866, as substantially amended by a later act entitled "An Act to Promote the Development of the Mining Resources of the United States." Several minerals, including oil

and gas, were removed from the Mining Law by the 1920 Mineral Leasing Act which applied to all lands belonging to the Federal Government that had not been privately owned. Federal mineral leasing authority was further extended by the 1947 Mineral Leasing Act which applies to acquired mineral estates which were patented and subsequently returned to Federal ownership through purchase, donation, condemnation, special act of Congress, or exchange under the Weeks Law.

The basic policy of promoting mineral exploitation has remained unchanged by the Mineral Leasing Acts of 1920 and 1947. The major changes made were: title to minerals remains with the United States, which has full discretion whether to make the resources available through leasing; the United States must be compensated for resource exploitation by payment of rentals or royalties; monopoly in federal mineral holdings is prevented and development is required.

B. Current Practices

Oil and gas leases are issued under two basic processes: competitive and non-competitive. When an area is within a known geological structure (KGS), competitive leases are issued. (Omitted.) Non-competitive leases are issued for lands outside a KGS. (Omitted.)

C. Decision-making Authority (Omitted.)

There are several levels of decision-making authority within the Forest Service itself. The District Ranger reviews all lease and permit applications and operating plans relating to his district. He then makes a recommendation to the Forest Supervisor on whether or not the permit or lease should be issued and what stipulations should be attached. The Regional Forester is responsible for the final review of recommendations on the lease or permit, which he then forwards to the appropriate BLM official for action. The Forest Service Chief retains final authority to make recommendations with regard to certain Forest Service lands, including wildernesses designated under the Wilderness Act of 1964, primitive areas, recreation areas designated by the Secretary of Agriculture, and irrigation districts.

评价与解释:

搜索至此,我已经发现有关油、气开发土地租赁的文献相当丰富。本文分别从历史发展(historical developments)、现行实务(current practices)以及决策权归属(decision-making authority)三个角度对相关制度进行了梳理。其中,第三部分对于行政合同的研究最为有益,体现了行政机关在租赁合同订立过程中的优势地位。

2.2.3.13. Long-term Leasing in Urban Renewal: an Alternative Method of Municipal Land Disposition, 68 Yale L. J. 1424, 1959.

One social implication of municipal leasing is that it implies a new theory of urban landholding—public ownership combined with private exploitation—in those parts of a city's center which require renewal. Critics of private land ownership have suggested that since the

community gives land its value, the community should reap the profits through public ownership of all urban land. But such a proposal is unjust to private interests, when the city takes no responsibility for the land's use or condition. Under such circumstances community land ownership would constitute nothing more than the appropriation of profit derived wholly from private effort. Through urban renewal programs, however, the community has begun to assume these liabilities; resuscitation of blighted urban land is now undertaken at public expense. In light of these public undertakings municipal leasing appears as a more realistic method of adjusting the interests of the community and the land occupier in land crucial to the urban community. Leasing places no greater restraints on land use than sale. Private parties profit to the same or a greater extent by leasing from the municipality. Primary responsibility for proper upkeep remains focused upon the land occupier. Meanwhile, the public is more fully compensated for the renewal costs it must sustain. In short, the long-term lease device can be a satisfactory means of recognizing the accomplished fact of public responsibility for land use, and repaying the public for its renewal costs, without reducing the incentives and rewards which have made private ownership so vital to democratic prosperity.

评价与解释:

本文的主题是在旧城改造过程中的长期租赁(Long-term Leasing in Urban Renewal)。但是,本文引起我兴趣的地方恰恰在于其对公有制与私有制的思考。在进行相关法律文献搜索前,我并不了解美国公共土地的租赁制度与实务,遑论从所有制的高度来剖析相关的内容。虽然行政合同与所有制等政治经济学问题并无太大的关涉,但若能以此为内容增加研究的深度,也是极有裨益的。